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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 346

JEREMIAH D. MAGUIRE AND RUTH S. MAGUIRE,
PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 19, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. .....

JEREMIAH D. MAGUIRE AND RUTH S. MAGUIRE,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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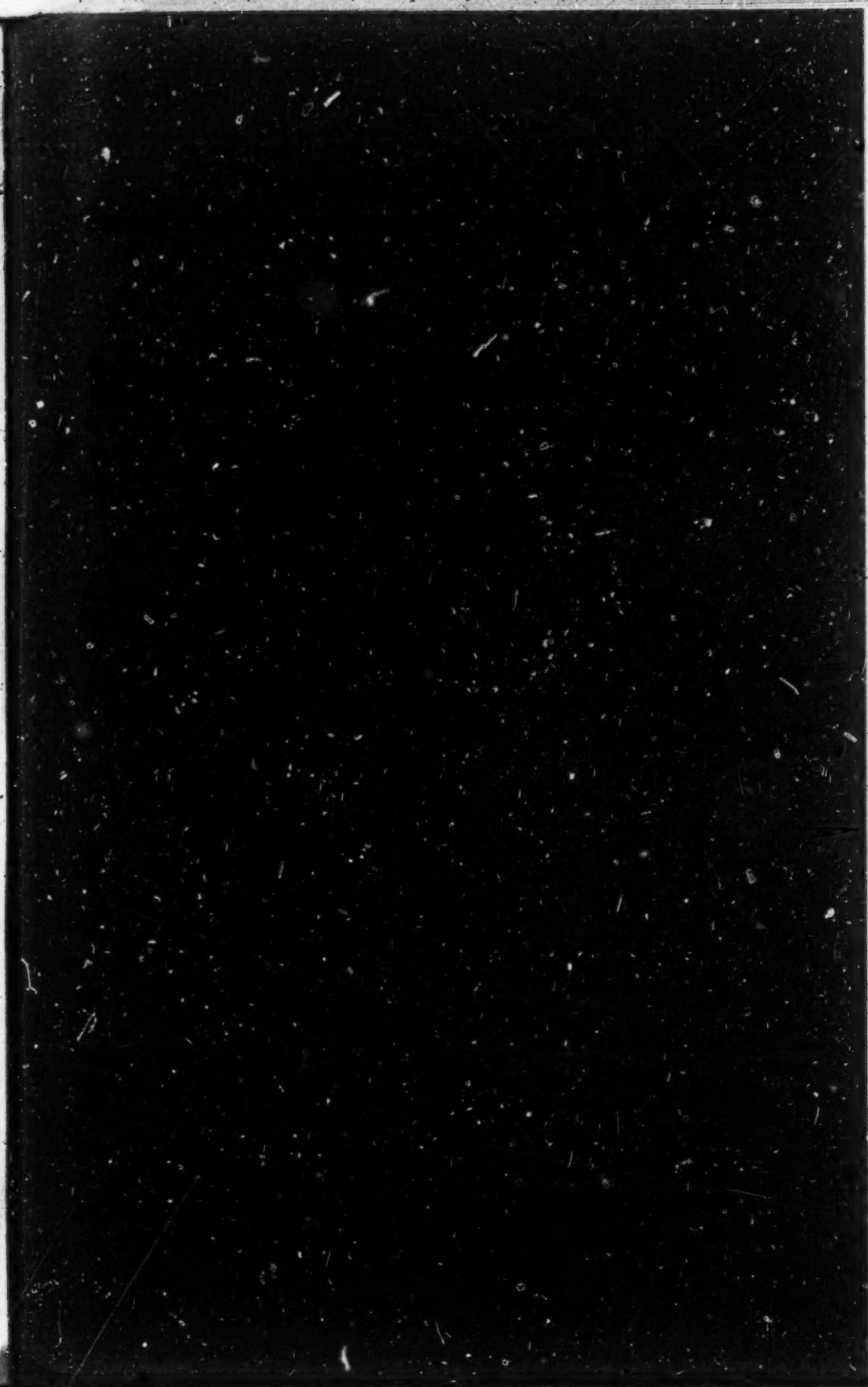

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IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

No. 7049

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

JEREMIAH D. MAGUIRE AND RUTH S. MAGUIRE,
Respondents.

Counsel for Petitioner:
MR. SAMUEL O. CLARK, JR.,
MR. SEWALL KEY.
Counsel for Respondents:
MR. FRANCIS E. BALDWIN.

Petition for Review of Decision of the United States Board of Tax Appeals.

J-15603 The Gunthorp-Warren Printing Company, Chicago—9-13-39—35

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Jeremiah D. Maguire and Ruth S. Maguire,
Petitioners,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 72216.

Appearances:

For Taxpayer: James A. Councilor, J. E. Brown, Esq.

For Comm'r: Brooks Fullerton.
Transferred to Mr. Smith 1/21/39.

1933.

May 11—Petition received and filed. Taxpayer notified. (Fee paid).

May 11—Copy of petition served on General Counsel.

June 29—Answer filed by General Counsel.

July 11—Copy of answer served on taxpayer.

1934.

Sept. 25—Notice of appearance of James A. Councilor as counsel, filed.

Sept. 25—Application for order to take depositions filed by taxpayer.

Oct. 2—Order to take deposition of Wm. E. Spratt, entered.

Nov. 28—Deposition of Wm. E. Spratt filed (2). Taxpayer served by notary. Commissioner served by Board. 11/30/34 copy served.

1935.

Dec. 19—Notice of appearance of James A. Councilor as counsel, filed.

Dec. 19—Notice of the withdrawal of J. Marvin Haynes, counsel for taxpayer, filed.

1937.

Oct. 27—Motion to consolidate with Dockets 90338 to 90344, inclusive for hearing and disposition filed by General Counsel.

Oct. 29—Motion to consolidate with dockets 90338 to 90344, inclusive for hearing and disposition, granted.

Nov. 20—Hearing set Feb. 14, 1938.

1938.

Jan. 17—Motion for a continuance filed by taxpayer. 1/18/38 granted to 5/2/38.

Apr. 19—Motion for continuance filed by taxpayer. 4/2/38 granted and continued to 5/17/38.

May 17—Hearing had before Mr. Mellott. Division #11, on merits. Submitted. Entry of appearance of J. E. Brown, stipulation of facts and amendment to answer filed. Petitioner's brief due 6/16/38; respondent's due 7/16/38; Reply due 8/1/38.

2 May 27—Transcript of hearing 5/17/38 filed.

June 14—Brief filed by taxpayer. 6/15/38 copy served on General Counsel.

Aug. 23—Motion to reopen the hearing to file amendment to stipulation of facts, filed by General Counsel.

Aug. 24—Motion to reopen the hearing to file amendment to stipulation of facts granted.

Aug. 24—Motion for leave to file the attached brief, brief lodged by General Counsel. 8/25/38 Granted.

Oct. 10—Motion for leave to file the attached reply brief filed by taxpayer. 10/10/38 granted.

Oct. 10—Reply brief filed by taxpayer.

Oct. 10—Copy of motion and reply brief served on General Counsel.

1939.

Feb. 28—Memorandum findings of fact and opinion rendered, Charles P. Smith, Div. 5. Judgment will be entered under Rule 50.

Mar. 21—Computation of deficiency filed by General Counsel.

Mar. 23—Hearing set April 12, 1939 on settlement under Rule 50.

Mar. 27—Consent to settlement filed by taxpayer.

Mar. 29—Decision entered, Charles P. Smith, Div. 5.

June 21—Stipulation of venue filed.

June 21—Petition for review by United States Circuit Court of Appeals, Seventh Circuit, with assignments of error filed by General Counsel.

July 1—Proof of service filed by General Counsel.

July 6—Proof of service filed by General Counsel, (J. D. & Ruth Maguire).

July 14—Certified copy of an order from United States Circuit Court of Appeals, 7th Circuit, directing the clerk of the Board to transmit, prepare and complete record in the Maguire case and abbreviated records in the remaining cases, filed.

July 22—Praecipe filed by General Counsel.

July 31—Proof of service of praecipe filed.

3 UNITED STATES BOARD OF TAX APPEALS. Filed May 11, 1933.

Jeremiah D. Maguire and Ruth S. Maguire,
Petitioners,
vs.
Commissioner of Internal Revenue,
Respondent.
Docket No. 72216.

PETITION.

Filed May 11, 1933.

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:D-1:MLR-60 D), dated March 18, 1933, and as a basis of their proceeding allege as follows:

1. The petitioners are husband and wife, residing at 990 Fifth Avenue, New York, N. Y. and filed a joint income tax return for 1930.

2. The notice of deficiency (a copy of which is attached, marked Exhibit A) was mailed to the petitioner on March 13, 1933.

3. The taxes in controversy are income taxes for the calendar year 1930 and for $71,429.62.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors.

(a) The respondent has erred in his determination that ordinary income of $53,791.64 and capital net gains of
4 $657,517.91 derived from the Swift Family Realty Trust and the Union Terminal Trusts are taxable to the beneficiaries rather than to the Trusts.

(b) The respondent has erred in his determination that the basis of certain property sold by the Swift Family Realty Trust in 1929 on the deferred payment plan (on which 60 per cent. of the profits is taxable in 1930) was in excess of $5,134,817.49 and that the gain taxable in 1930 upon such sale should be computed on said basis.

(c) The respondent has erred in his determination that the basis of certain property sold by the Union Terminal Trust in 1930 was in excess of $2,109,687.19.

(d) In determining the taxable net income, the respondent erroneously increased the net income originally re-

ported by dividends of $7,035.75 received from the South San Francisco Land and Improvement Company.

(e) In determining the amount of contributions allowable as a deduction under Section 23(n) of the Revenue Act of 1928, the respondent has erroneously excluded capital net gains from the net income on which the 15 per cent. limitation is to be computed.

5. The facts upon which the taxpayer relies as the basis of this proceeding are as follows:

As to the error alleged in paragraph 4 (a) herein:

(a) Both the Swift Family Realty Trust and the Union Terminal Trust are trusts the income of which in the
5 discretion of the fiduciary may be either distributed to the beneficiaries or accumulated, and that as such the income therefrom is taxable to the Trustees, under the provisions of Section 161 and 162 of the Revenue Act of 1928.

(b) The Swift Family Realty Trust and the Union Terminal Trust were formed March 29, 1923, at which time there were transferred to the said Trusts certain properties belonging to the Estate of Mr. G. F. Swift.

(c) Certain of the properties which were acquired by the Swift Family Realty Trust in 1923 were sold on the deferred payment plan in 1929. Such properties were owned by G. F. Swift at the date of his death in 1903 and had been administered by his estate from that date until they were transferred to the Swift Family Realty Trust in 1923.

(d) The property which was thus sold by the Swift Family Realty Trust consisted of shares of stock in several land companies, and notes receivable from such companies, the Swift Family Realty Trust owning one-third of the total of all investments in and advances to the said land companies.

As to the error alleged in paragraph 4 (b) herein:

(e) The March 1, 1913 value, plus cost of net additions subsequent thereto, of the property sold by the Swift Family Realty Trust in 1929 was $5,134,817.49.

(f) This property was sold to the Geneva Corporation in 1929 for a total consideration to the Swift Family,
6 Realty Trust of $6,500,000 of which 40 per cent. was payable, and was paid, by the said Geneva Corporation to the Swift Family Realty Trust in the year 1929, and on which taxes were paid in 1929; and 60 per cent., or $3,900,000 was payable, and was paid, to the Swift Family Realty Trust in 1930.

(g) The accounts of the Swift Family Realty Trust have at all times been kept on the basis of cash receipts and disbursements.

As to the error alleged in paragraph 4 (c) herein:

(h) The sole asset owned by the Union Terminal Trust in 1923 was capital stock of Union Terminal Railway Company, St. Joseph, Mo. (of which it owned 100 per cent.) together with certain open accounts of the said Railway Company.

(i) The said capital stock of the Union Terminal Railway Company was owned by G. F. Swift at the date of his death in 1903, and from that date until the formation of the Union Terminal Trust, March 29, 1923, was administered by the estate of the said G. F. Swift.

(j) The March 1, 1913, value of the investment of the Union Terminal Trust in the said Union Terminal Railway Company, plus the cost of net additions thereto to the date of the sale of the said investment in the year 1930, was $2,109,687.19.

(k) In the year 1930 this investment was sold to the Geneva Corporation for $4,600,000 in cash.

7 As to the error alleged in paragraph 4 (d) herein:

(l) During the year 1930 the petitioners received the following cash dividends on 531 shares of stock of the South San Francisco Land and Improvement Co.:

February	1930	$5,310
June	1930	2,655
		$7,965

(m) Under date of December 15, 1930, the South San Francisco Land and Improvement Company advised its stockholders that for Federal Income Taxes the above dividends should be treated as follows:

Dates Paid	—Per Share— From Earnings Accumulated Since Mar. 1, 1913	From Surplus Accumulated Prior to Mar. 1, 1913
Jan. 31, 1930	$1.75	$8.25
Jun. 21, 1930	None	5.00

(n) In their original return of taxable income petitioners reported as taxable dividends $929.25, representing $1.75 per share on 531 shares of said stock.

(o) The Commissioner has added to the petitioners taxable income the following amounts:

February	1930	$4,380.75
June	1930	2,655.00
		$7,035.75

8 (p) The difference of $7,035.75 between the total received of $7,965.00 and the amount reported of $929.25 is a distribution from earnings of the South San Francisco Land and Improvement Company accumulated prior to March 1, 1913.

As to the error alleged in paragraph (e) herein:

(q) In determining the deduction allowable for contributions, the respondent failed to include the capital net gain, alleged in his notice of deficiency, in the net income upon which the 15 per cent. limitation is to be computed.

6. Wherefore, the petitioner prays that this Board may hear this proceeding and upon the evidence to be produced, find:

(a) That no part of the income of the Swift Family Realty Trust and of the Union Terminal Trust is taxable to the petitioners.

(b) In the event any part of the gain derived by the Swift Family Realty Trust from the sale of its properties in 1929 is found to be taxable to the petitioners, that the basis of such property is $5,134,817.49.

(c) In the event any part of the gain derived by the Union Terminal Trust from the sale of shares and accounts of the Union Terminal Railway Company is found to be taxable to the petitioners, that the basis of such property is $2,109,687.19.

(d) That $7,035.75 of the distribution of $7,965.00 received from the South San Francisco Land and Improvement Company is not taxable to the petitioners.

9 (e) In the event any part of the gains derived from the sale of capital assets by the Swift Family Realty Trust and/or the Union Terminal Trust are held to be income of the petitioners, that such gains, whether taxed as ordinary income or as capital net gains, are to be included in the petitioners' net income upon which the 15 per cent. limitation of the deduction for contributions is to be computed.

(f) Afford such further relief as the nature of the case

may require and to the Board may seem equitable and proper.

(Sgd.) J. Marvin Haynes,
J. Marvin Haynes,
Counsel for Petitioner,
916 Investment Building,
Washington, D. C.

Of Counsel:
Lybrand, Ross Bros. & Montgomery,
C. J. McGuire,
W. C. Magathau.
Dated May 10, 1933.

State of New York, }
County of ..... } ss.

Jeremiah D. Maguire and Ruth S. Maguire, both being duly sworn, say that they are the petitioners above named; that they have read the foregoing petition and are familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts they believe to be true.

(Sgd.) Ruth S. Maguire.
(Sgd.) Jeremiah D. Maguire.

Subscribed and sworn to before me this 10 day of May, 1933.

(Sgd.) Thomas J. Shanahan,
Notary Public.

11 NP-2-28

TREASURY DEPARTMENT
Washington.

Office of
Commissioner
of Internal
Revenue March 13, 1933.

Mr. Jeremiah D. and Mrs. Ruth S. Maguire,
990 Fifth Avenue,
New York, New York.

Sir and Madam:

You are advised that the determination of your tax liability for the year(s) 1930 discloses a deficiency of $71,429.82, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, If You Do Not Desire to Petition, you are requested to execute the inclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the inclosed form, or on the date assessment is made, whichever is earlier; Whereas If This Form Is Not Filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,
David Burnet,
Commissioner,
By W. Sherwood,
Acting Deputy Commissioner.

Inclosures:
Statement
Form 870

12 Statement.

IT:AR:D-1
MLR-60D

In re: Mr. Jeremiah D. and Mrs. Ruth S. Maguire,
990 Fifth Avenue,
New York, New York.

Income Tax Liability.

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1930	$72,378.08	$948.46	$71,429.62

The report of the internal revenue agent in charge at New York, New York, copy of which was furnished you under date of September 22, 1932, has been reviewed in connection with information submitted to this office by the internal revenue agent in charge at Chicago, Illinois.

It appears that Mrs. Ruth S. Maguire owned an eighth interest in the Swift Family Realty Trust, Chicago, Illinois, and a like interest in the Union Terminal Trust, Chicago, Illinois.

This office holds that the income of the above-named trusts was taxable to their respective beneficiaries.

Reference is hereby made to office letter addressed to you under date of February 8, 1933, advising you of your right to extend the statutory period of limitation for assessment of income tax for the year 1930. Inasmuch as you made no reply to that letter and evidenced no desire to extend the period for assessment, it is necessary to prepare a final notice of deficiency as provided by section 272 of the Revenue Act of 1928 in order to protect the interests of the Government against the tolling of the statute of limitations with respect to the year 1930.

The distributive net income of the above named trust has been tentatively determined as follows:

Swift Family Realty Trust.

Ordinary income	$ 256,348.88
Capital net gain	$1,757,374.95

13 Union Terminal Trust.

Ordinary income	$ 173,984.22
Capital net gain	$3,502,768.35

Mrs. Maguire's taxable income is, accordingly, held subject to the following increase:

Ordinary income	
(1/8 of $256,348.88 plus $173,984.22)	$ 53,791.64
Capital gain	
(1/8 of $1,757,374.95 plus $3,502,768.35	$657,517.91

The report of the internal revenue agent in charge at New York, New York, has been adjusted as follows:

Dividends from the Southern San Francisco Land and Improvement Company have been included as 100% taxable since the 1930 income tax return of that corporation is still in process of adjustment.

Trust income has been included as explained above.

Recomputation of Tax.

Income reported on your return:		
Ordinary income		$ 63,812.53
Capital loss	$ 29,628.32	
Add:		
To adjust loss on sale of stocks, as explained on page 3 of revenue agent's report		3,237.15
Dividends — Southern San Francisco Land and Improvement Company		7,035.75
To adjust as explained on page 4 of revenue agent's report		1,034.14
Foreign dividends		617.50
From trusts:		
Ordinary income		53,791.64
Capital t gain	657,517.91	
Total	$627,889.59	$129,528.71

14 Brought forward	$627,889.59	$129,528.71
Deduct:		
Capital net loss (See page 5, revenue agent's report)	163,644.22	
To adjust contributions and allow 15% of ordinary net income		14,301.67
Revised income	$464,245.37	$115,227.04
Less:		
Dividends—your return	$265,456.24	
Add:		
Revenue agent's report	1,084.14	
Southern San Francisco Land and Improvement Company	7,035.75	
Total	$273,526.13	
Personal exemption	3,500.00	
		277,026.13
Balance subject to normal tax		None
Normal tax		None
Surtax on $115,227.04		$ 14,705.41
Tax on capital net gain, 12½% on $464,245.37		58,030.67
Total		$ 72,736.08
Less:		
Earned income credit	$ 220.00	
Tax paid at source	138.00	358.00
Net tax assessable		$ 72,378.08
Tax assessed		948.46
Deficiency		$ 71,429.62

Contributions have been adjusted on the following basis:

Ordinary net income before adjusting contributions, as shown above	$129,528.71
Your deduction for contributions	6,032.51
Total ordinary net income without deduction for contributions	$135,561.22
15% allowable as a deduction for contributions	20,334.18
Ordinary net income as finally revised	$115,227.04

Filed June 29, 1933. 15

UNITED STATES BOARD OF TAX APPEALS.

(Caption—72216)

ANSWER.

Filed June 29, 1933.

Comes now the respondent by his attorney, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, and in answer to the petition of the petitioner, admits, denies and alleges as follows:

1, 2 and 3. Admits the allegations contained in paragraphs one, two and three of the petition.

4. (a) to (e) inc. Denies that the respondent committed errors as alleged in sub-paragraphs (a) to (e) of paragraph four of the petition.

5. (a) Denies the allegations contained in paragraph five (a) of the petition.

5. (b) to (k) inc. Denies each and every allegation contained in sub-paragraphs (b) to (k) inc. of paragraph five of the petition, which is contrary to or inconsistent with the determination of the Commissioner as set forth in the notice of deficiency.

16 5. (l). Admits the allegations contained in paragraph five (l) of the petition.

5. (m) Has sufficient knowledge to form a belief as to the allegations contained in paragraph five (m) of the petition, and hence denies the same.

5. (n) and (o) Admits the allegations contained in sub-paragraphs (n) and (o) of paragraph five of the petition.

5. (p) Denies the allegations contained in paragraph five (p) of the petition.

5. (q) Admits that in determining the deduction allowable for contributions, the respondent failed to include the capital net gain in the net income upon which the 15 per cent limitation is to be computed, but denies that such action was erroneous.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be

denied and the Commissioner's determination of deficiency be approved.

(Signed) E. Barrett Prettyman,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
DeWitt M. Evans,
Special Attorney
Bureau of Internal Revenue.

17 UNITED STATES BOARD OF TAX APPEALS.

Filed May 17, 1938.

(Caption—72216)

AMENDMENT TO ANSWER.

Filed May 17, 1938.

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and as an amendment to the answer to petition herein, and for the purpose of conforming the pleadings to the proof and asserting claim to a deficiency in excess of that determined by the deficiency notice of March 13, 1933, alleges as follows:

That in the deficiency notice, a copy of which is attached to the petition herein, the Commissioner of Internal Revenue determined that the basis, for the purpose of computing the capital gain applicable to the year 1930, upon a sale of certain property of the Swift Family Realty Trust was the fair market value as of March 1, 1913, adjusted to date of sale in the amount of $3,547,041.75.

The parties hereto have filed a stipulation of fact in which it is agreed that the fair market value as of March 1, 1913 of said property adjusted to date of sale is $3,221,232.58.

Wherefore, respondent prays that the Board redetermine the additional income, and additional deficiency resulting from said lower basis, and respondent hereby
18 asserts claim to said additional deficiency.

(Signed) J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
Brooks Fullerton,
Special Attorney,
Bureau of Internal Revenue.
fjk-jpm 5-11-38

Filed May 17, 1938. 39

STIPULATION OF FACTS.

U. S. Board of Tax Appeals
Filed at Hearing
May 17, 1938

UNITED STATES BOARD OF TAX APPEALS.

Jeremiah D. Maguire
and
Ruth S. Maguire,
Petitioners,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 72216.

Harold M. Swift,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 90338.

Gustavus F. Swift,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 90339.

Charles M. Swift,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 90340.

Charles M. Swift, T. Philip Swift, Edward F. Swift, Executors, Estate of Edward F. Swift, Deceased,
Petitioners,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 90341.

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40 Louis F. Swift, Jr., Gustavus F. Swift, Henry Veeder, Executors, Estate of Louis F. Swift, Deceased,
Petitioners,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 90342.

Helen Swift Neilson,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 90343.

George H. Swift,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 90344.

STIPULATION OF FACTS.

It is hereby stipulated by and between the parties hereto that for the purpose of the above-entitled proceedings the following facts shall be taken as true. Each party reserves the right to introduce other evidence not inconsistent herewith or to object to the consideration by the Board of any fact herein stated on the ground that such fact is not material or relevant, or is not competent evidence to prove any issue involved.

41 (1). Gustavus F. Swift died testate, a resident of Illinois, on March 29, 1903. His last will and testament was probated on May 2, 1903, in Cook County, Illinois. A true copy of said last will and testament is attached hereto, made a part hereof and marked "Exhibit 1".

(2) Gustavus F. Swift left nine children surviving him, one of whom died on October 19, 1911. The petitioners, George H. Swift, Charles H. Swift, Gustavus F. Swift, Harold R. Swift, Ruth Swift Maguire* and Helen Swift

* Ruth Swift Maguire and her husband, Jeremiah D. Maguire, filed a joint return for the calendar year 1930, and the husband has joined in the petition in docket No. 72216.

Neilson are six of said nine children. Louis F. Swift died May 12, 1937. The petitioners in docket No. 90342, Louis F. Swift, Jr., Gustavus F. Swift and Henry Veeder, are the executors of his estate. Edward F. Swift died May 28, 1932. The petitioners in docket No. 90341, Charles H. Swift, T. Philip Swift and Edward F. Swift, Jr., are the executors of his estate.

(3) On December 11, 1905, the final account of Louis F. Swift, Edward F. Swift and Edward Tilden, as executors of the last will and testament of Gustavus F. Swift, deceased, was presented to and approved by the Probate Court of Cook County, Illinois. Pursuant to order of said Probate Court, entered on December 11, 1905, approving said final account and discharging said executors, a true copy of the pertinent parts of which order is attached hereto, made a part hereof, and marked "Exhibit 2", said executors turned over to themselves, as trustees under said last will and testament of said decedent, in accordance
42 with the provisions thereof, all of the residue of the estate of Gustavus F. Swift then remaining in their hands as such executors. Included in such residue were the following assets, which said executors on December 11, 1905, transferred to themselves as trustees under said last will and testament:

	Number of Shares
Capital Stock	
Union Terminal Railroad Company	2,500
North Kansas City Development Company	333⅓
Union Depot Bridge & Terminal Railway Company (Common)	83⅓
Union Depot Bridge & Terminal Railway Company (Preferred)	5,876⅔
Kansas City Ferry Company	10⅔
Guinotte Land Company	66⅔
Bills Receivable	**Face Value**
Notes of Union Depot Bridge & Terminal Railway Company, dated March 2, 1903, due 6 Months after date, bearing interest at 5 per cent per annum aggregating in face value	$331,147.25
Note of Union Depot Bridge & Terminal Railway Company, dated March 13, 1903, due September 2, 1903, bearing interest at 5 per cent per annum, face value	8,000.00

Upon said notes of Union Depot Bridge & Terminal Railway Company, aggregating $339,147.25 in face value, payment of $113,049.08 principal and $3,827.74 interest was received on November 21, 1903, and said payment so endorsed on said notes.

(4) Said Edward Tilden died on February 5, 1915, and on March 1, 1915, Charles H. Swift was elected and chosen to succeed said Edward Tilden as testamentary trustee by the majority vote of the remaining trustees and the widow and children of said Gustavus F. Swift, pursuant to the terms of clause 9 of said last will and testament.

43 (5) Between December 11, 1905, and March 29, 1923, said testamentary trustees administered said assets so transferred to them, under said last will and testament, as described in paragraph (3) of this stipulation. During said period, said testamentary trustees acquired certain additional assets listed as follows:

	Number of Shares
Common Stock	
Union Terminal Railroad Company	2,500
North Kansas City Land & Improvement Company	600
Parkside Land Company	500
Preferred Stock	
Union Depot Bridge & Terminal Railway Company	666⅔

in consideration for money advanced by said testamentary trustees to the corporations mentioned in the above list. In each case the amount of money advanced was less than the fair market value on March 29, 1923, of said securities so acquired. The fair market value on March 1, 1913, of such of said securities as were issued prior to that date, was less than the fair market value of said securities on March 29, 1923.

(6) On March 29, 1923, said eight surviving children of Gustavus F. Swift joined in forming the Union Terminal Trust by the execution of a written instrument, a copy of which is attached hereto, made a part hereof, and marked "Exhibit 3". By formal instruments executed by the parties to the agreement creating said Union Terminal Trust the life of said Trust was extended to March 29, 1932.

44 (7) On March 29, 1923, said eight surviving children of Gustavus F. Swift joined in forming the Swift Family Realty Trust by the execution of a written instrument, a copy of which is attached hereto, made a part hereof, and marked "Exhibit 4". By formal instruments executed by the parties to the agreement creating said Swift Family Realty Trust the life of said Trust was extended from time to time, and said Trust still exists.

(8) On March 29, 1923, each of the six surviving sons of Gustavus F. Swift executed a written order to said testamentary trustees. A true copy of such order, signed by George H. Swift, is attached hereto, made a part hereof, and marked "Exhibit 5". The other five sons, namely, Louis F. Swift, Edward F. Swift, Charles H. Swift, Gustavus F. Swift and Harold H. Swift, signed identical orders. On March 29, 1923, the two surviving daughters of said Gustavus F. Swift each executed a written order to said testamentary trustees. A true copy of such order, signed by Ruth Swift Maguire, is attached hereto, made a part hereof, and marked "Exhibit 6". Helen Swift Neilson signed an identical order.

(9) On March 29, 1923, each of said eight surviving children of Gustavus F. Swift executed a written acknowledgment of receipt of his (or her) full one-eighth distributive share of the estate of Gustavus F. Swift, deceased. A true copy of such receipt, signed by George H. Swift, is attached hereto, made a part hereof, and marked "Exhibit 7". The other surviving children, namely, Louis P. Swift, Edward F. Swift, Charles H. Swift, Gustavus F. Swift, Harold H. Swift, Ruth Swift Maguire and Helen Swift Neilson signed identical instruments.

45 (10) On March 29, 1923, pursuant to said orders of said eight surviving children of Gustavus F. Swift, said testamentary trustees transferred to Louis F. Swift, Edward F. Swift and Charles H. Swift, as Trustees of said Union Terminal Trust, the following assets:

Common Stock, Union Terminal Railroad Company	5,000 Shares
Accounts Receivable, Union Terminal Railroad Company, Face Value	$964,113.27

(11) On January 2, 1930, said Union Terminal Trust sold said 5,000 shares of the capital stock of Union Terminal Railroad Company and said accounts receivable, due from said Union Terminal Railroad Company, for a total consideration of $4,600,000 in cash or its equivalent.

(12) The fair market value, as of March 1, 1913, of the assets so sold by said Union Terminal Trust on January 2, 1930, adjusted to the date of sale, was $1,164,660.70. The fair market value, as of March 29, 1923, of the assets so sold by said Union Terminal Trust on January 2, 1930, adjusted to the date of sale, was $1,988,863.28. The cost of said assets, adjusted to the date of sale, was $1,212,899.71.

(13) If the basis for determining the profit from the sale of said assets so sold by said Union Terminal Trust be decided by the Board to be the fair market value thereof at March 1, 1913, the Board may find that the profit from such sale is $3,387,100.29, of which sum one-eighth, or $423,387.54, is taxable as capital gain to each petitioner
46 herein in the calendar year 1930.

(14) If the basis for determining the profit from the sale of said assets so sold by said Union Terminal Trust be decided by the Board to be the fair market value thereof at March 29, 1923, the Board may find that the profit from such sale is $2,611,136.72, of which one-eighth, or $326,392.09, is taxable as capital gain to each petitioner herein in the calendar year 1930.

(15) On March 29, 1923, pursuant to said orders mentioned in paragraph (8) above, said testamentary trustees transferred to Louis F. Swift, Edward F. Swift and Charles H. Swift, as Trustees of said Swift Family Realty Trust, the following assets:

Capital Stock	Number of Shares
Union Depot Bridge & Terminal Railway Company (Preferred)	6,543
Union Depot Bridge & Terminal Railway Company (Common)	83-1/3
North Kansas City Development Company	333-1/3
North Kansas City Land & Development Company	600
Parkside Land Company	500
Guinotte Land Company	66-2/3
Kansas City Ferry Company	10-2/3
Notes Receivable	**Face Value**
Union Depot Bridge & Terminal Railway Company	$ 417,314.32
North Kansas City Development Company	1,670,334.83

(16) On November 4, 1929, said Swift Family Realty Trust sold said assets described in paragraph (15) hereof

for a total consideration of $6,500,000.00. Of said con-
47 sideration, the amount of $2,600,000.00 was paid to said Swift Family Realty Trust on November 9, 1929, and the remainder, i. e., $3,900,000.00, was paid to said Trust on October 16, 1930.

(17) Said Swift Family Realty Trust filed a Federal income tax return for the calendar year 1929, reporting the profit from such sale on the installment basis. On said return, 40 per cent of the total profit was stated to be $555,673.00, and was reported as capital gain in the calendar year 1929, and said Swift Family Realty Trust paid the tax thereon.

(18) The assets so sold by said Swift Family Realty Trust constituted a one-third interest in the total outstanding capital stock and outstanding notes of the corporations named in paragraph (15) of this stipulation. As of March 1, 1913, the fair market value of said one-third interest in said outstanding capital stock and outstanding notes of said corporations, adjusted to the date of sale, was $3,221,232.58. As of March 29, 1923, the fair market value of said one-third interest, adjusted to the date of sale, was $4,499,333.00.

(19) The cost of said one-third interest in said capital stock and outstanding notes of said corporations to Gustavus F. Swift, deceased, and to said testamentary trustees was less than the March 1, 1913, value thereof.

(20) During the calendar year 1930, said Swift Family Realty Trust paid a commission of $24,000.00 upon said sale consummated on November 4, 1929. Said Swift Fam-
ily Realty Trust kept its books of account on the cash
48 receipts and disbursements basis during the calendar years 1929 and 1930.

(21) If the basis for determining the profit from the sale of said assets so sold by said Swift Family Realty Trust, as described in paragraph (16) of this stipulation, be decided by the Board to be the fair market value thereof at March 1, 1913, the Board may find that the profit realized in 1930 from such sale is $1,943,260.45, of which one-eighth, or $242,907.56, is taxable to capital gain to each petitioner herein in the calendar year 1930.

(22) If the basis for determining the profit from the sale of said assets so sold by said Swift Family Realty Trust, as described in paragraph (16) of this stipulation, be decided by the Board to be the fair market value thereof at

March 29, 1923, the Board may find that the profit realized in 1930 from such sale is $1,176,400.20, of which one-eighth, or $147,050.02, is taxable as capital gain to each petitioner herein in the calendar year 1930.

(23) Nothing contained in Paragraphs (12), (14), (21) and (22) of this stipulation shall be construed so as to deprive any party of its right to appeal from the decision of the Board.

(Sgd.) Francis E. Baldwin
Counsel for the Petitioners.

(Signed) J. P. Wenchel GWK
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue, Counsel for the Respondent.

49 UNITED STATES BOARD OF TAX APPEALS.

Filed Aug. 24, 1939.

* * * (Caption—72216, 90338-90344) * *

AMENDMENT TO STIPULATION OF FACTS.

Filed Aug. 24, 1939.

It is hereby stipulated by and between the parties hereto that the "Stipulation of Facts" filed in the above proceedings at the hearing on May 17, 1938 is amended as follows:

50 The last sentence of paragraph 12 on page 7 of said stipulation is amended to read as follows:

The cost of said assets to Gustavus F. Swift, deceased, and the fair market value thereof as of December 11, 1905 when received by said testamentary trustees, adjusted to the date of sale, was $1,212,899.71.

That paragraph 13 on page 7 of said stipulation is amended by striking the date "March 1, 1913" appearing in the third line of said paragraph 13 and substituting therefor the date "December 11, 1905."

That paragraph 19 on page 9 of said stipulation is amended to read as follows:

(19) The cost of said one-third interest in said capital stock and outstanding notes of said corporations to Gustavus F. Swift, deceased, and the fair market value thereof as of December 11, 1905, when received by said testament-

ary trustees, were less than the March 1, 1913 value thereof.

(S) J. A. Councilor,
Counsel for Petitioners.
Signed J. P. Wenchel Y
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
Brooks Fullerton,
Special Attorney,
Bureau of Internal Revenue.

51 EXHIBIT 1.

Certified Copies
of
Last Will
and
Testament
of
Gustavus F. Swift,
and
Letters Testamentary.

Will dated March 21st, 1903.

Letters dated May 2d, 1903.

52 I, Gustavus F. Swift, of the City of Chicago, County of Cook and State of Illinois, do hereby make and declare this to be my last will and testament, hereby revoking all former wills by me made.

1. I give, devise and bequeath to my wife, Ann M. Swift, and to her heirs and assigns, forever, the pieces and parcels of land on which I now reside, and all the buildings and improvements thereon situated. The premises are particularly described as follows, to wit:

The south half (½) of lot six (6), all of lot seven (7), and the east fifty (50) feet of the south one hundred and fifty (150) feet of lot eight (8) in the subdivision of block four (4) in Drexel and Smith's subdivision of the west

half (½) of the north-west quarter (¼), and the west half (½) of the west half (½) of the south-west quarter (¼) of section eleven (11), township thirty-eight (38) north, range fourteen (14) east of the third (3rd) principal meridian, in Cook County, Illinois, being one hundred and fifty (150) feet front on Ellis avenue by two hundred and fifty (250) feet on Forty-ninth street, on the north-west corner of said streets.

Also all my household furniture and fixtures, pictures, plate and household stores of every kind. Also all my horses, carriages, harness, cows and other property used at or in connection with said residence.

2. I give, devise and bequeath to my sons, Louis F. Swift and Edward F. Swift, and to my friend, Edward Tilden, as executors and trustees, all the rest and residue of my property of every nature and description and wherever situated, to have and to hold under the following trusts and conditions, viz.:

3. My said executors and trustees may continue all existing business and partnerships in which I may be interested, or settle and discontinue the same, or any of them, at any time when in their judgment it is for the interests of my estate the same should be discontinued; they may improve, lease or sell any of
53 my real estate or personal property and execute deeds of conveyance therefor; they may make investments in real estate or personal property, and change the same in their discretion; they may give and renew notes, execute mortgages, and generally do any and all things necessary to be done in and about the proper and judicious management of my estate and the execution of the trusts herein contained as I could do if living.

4. As soon as the same can be done without prejudice to my estate, may said executors and trustees are directed to pay all my debts, and for this purpose they shall convert into money such real estate or personal property as in their judgment shall be most available for that purpose, and which will least prejudice the management of the estate or the value thereof.

5. My said executors and trustees are hereby directed to pay to my wife, Ann M. Swift, commencing with the date of my decease, and continuing until the final distribution of my estate shall take place under the provisions of this will, or until her death, if she shall die before such distribution, the sum of forty thousand dollars ($40,000) per year, payable in equal monthly install-

ments, for her sole use, the same to be expended according to her sole judgment and discretion.

6. My said executors and trustees are hereby directed to pay to each of my children, commencing with the date of my decease and continuing until the final distribution of my estate shall take place under the provisions of this will, the sum of eight thousand dollars ($8,000) per year, payable in equal monthly installments, for the sole use of each such child. And if any of my children shall have died before my decease, or shall die before said final distribution of my estate, leaving child or children, then such sum shall be paid to the guardian of such child or children for their sole use.

7. When all the debts of my estate which existed at the time of my decease shall have been paid my said
54 trustees are directed to make a first and partial distribution of my estate as follows:

(a) They shall give to each of my brothers and sisters, who shall be living at that time, the sum of five thousand dollars ($5,000) and the same sum to the children, if any, of any deceased brother or sister (provided such deceased brother or sister leaves no wife or husband, as the case may be, surviving), to be divided equally among such children.

(b) They shall set aside as a trust fund for the benefit and use of each surviving wife or husband, as the case may be, of any deceased brother or sister, the sum of five thousand dollars ($5,000), and shall pay the income thereof to such surviving wife or husband during her or his life and after the death of such surviving wife or husband they shall pay said principal sum of the surviving children of my said deceased brother or sister or their descendants per stirpes and not per capita, and if there be no surviving child or children or descendants thereof then such principal sum shall revert to my estate.

(c) They shall give to each of my grandchildren, and to each of my nephews and nieces who shall be living at that time, the sum of one thousand dollars ($1,000), and the same sum to the children, if any, of any deceased grandchild, nephew or niece, to be divided equally among such children.

(d) They shall give to my wife, Ann M. Swift, if living, the sum of two hundred and fifty thousand dollars ($250,000) to be expended by her for charitable purposes in such manner and to such persons or parties as she may see fit. My said wife fully understands my views on this

subject and I desire that the said sum be distributed by her in accordance with her judgment and discretion, and that she be not called upon to render any account for the same.

(e) They shall give to my wife, Ann M. Swift, if living, for her sole use and benefit, the sum of three hundred thousand dollars ($300,000) to be paid to her in stock of Swift and Company and of Swift Refrigerator Transportation Company, at the par value of such stock and in the proportion of four shares of the former to one share of the latter.

(f) They shall give to each of my children who shall have attained their majority, for their respective sole use and benefit, the sum of one hundred thousand dollars ($100,000), and if any of my children shall have died before such payment, leaving children, the same sum shall be paid to the guardian of such children for their use and benefit, said sum to be paid in stock of Swift and Company and of Swift Refrigerator Transportation Company, at the par value of such stock and in the proportion of four shares of the former to one share of the latter.

(g) As each of my other children shall respectively attain their majority, after such first distribution shall have been made as above provided, my executors and trustees are directed to give each such child, for his or her sole use and benefit, the sum of one hundred thousand dollars ($100,000), to be paid in stock of Swift and Company and of Swift Refrigerator Transportation Company, at the par value of such stock and in the proportion of four shares of the former to one share of the latter, and also a sum of money equal to all the earnings of said stock after the date of said first distribution as above provided, and interest at the rate of 6 per cent per annum upon such earnings.

8. My said executors and trustees are directed to make a final distribution of all the rest and residue of my estate among my wife and children, at any time in their judgment and discretion after the expiration of ten (10) years from and after the date of my decease, but not before, and, in any event, not later than twenty (20) years thereafter, giving to my wife the one-third part thereof, the balance to be equally divided among my children, share and share alike, and should my wife not be living

at the time of such distribution, then the same shall
56 be divided equally among my children, share and share alike, the descendants of any deceased children in such distribution to take the proportion of their deceased parent, and in case my executors and trustees are not able to make a fair and equitable distribution of my estate in kind, they shall have power to sell any or all of the real estate or personal property and convert the same into money so that the same shall be fairly and equitably distributed as hereinbefore provided.

9. In the management of my estate and the transaction of any business pertaining thereto the concurrence of two executors and trustees shall be required. In case of the death or refusal to act of any executor or trustee, his successor shall be chosen by the majority vote of the remaining executors and trustees, my wife and adult children, my wife to cast two votes and the others one vote each. The surviving executors and trustees shall have but one vote each whether in the capacity of trustee or heir. Such a selection shall be evidenced by a statement in writing, signed by those casting a majority of the votes entitled to be cast at such election, duly acknowledged and recorded in the office of the recorder of deeds for Cook County, Illinois.

10. My said executors and trustees shall be allowed to charge and receive the sum of three thousand dollars ($3,000) per year each for their services as trustees from the date of my decease until the time of the final distribution of my estate, which shall be in full payment for all their services either as trustees or executors.

11. The provisions of this will in favor of my wife, Ann M. Swift, are intended to be in lieu of dower, widow's award, and all other provisions for the widow made by the laws of Illinois or of the several states where any of my estate, real or personal, may be situate.

12. I hereby appoint my sons, Louis F. Swift and Edward F. Swift, and my friend, Edward Tilden, the
57 executors of this will, and I request that no bonds be required of them either as executors or trustees.

Witness my hand and seal this twenty-first day of March, A. D. 1903.

Gustavus F. Swift. (Seal)

Signed, sealed and declared to be his last will and testament by Gustavus F. Swift in our presence. And we in his presence, and at his request, and in the presence

of each other, have subscribed our names as witnesses thereto this twenty-first day of March, A. D. 1903.

Albert H. Veeder,
4842 Vincennes Ave., Chicago.
Henry Veeder,
4841 Vincennes Ave., Chicago.
Frank Donnelly,
5542 South Park Ave., Chicago.

58 Will approved and admitted to record in open court this second day of May, A. D. 1903.

Charles S. Cutting,
Probate Judge.

State of Illinois, } ss.
County of Cook. }

IN THE PROBATE COURT OF COOK COUNTY.

Proved and admitted to record in open court this 2d day of May, A. D. 1903.

Patrick J. Cahill,
Clerk.

Filed April 8, 1903.

Patrick J. Cahill,
Clerk.

59 State of Illinois, } ss.
County of Cook. }

The People of the State of Illinois,
To all to whom these presents shall come, Greeting:

Know Ye, That whereas Gustavus F. Swift, late of the County of Cook and State of Illinois, died on about the 29th day of March, A. D. 1903, as it is said, after having duly made and published his last will and testament, a copy whereof is hereunto annexed, leaving at the time of his death property in this state, which may be lost, destroyed or diminished in value, if speedy care be not taken of the same; and inasmuch as it appears that Louis F. Swift, Edward F. Swift and Edward Tilden have been appointed executors in and by the said last will and testament, to execute the same, and to the end that the said property may be preserved for those who shall appear to have a legal right or interest therein, and that said will may be executed according to the request of said testator, we do hereby authorize the said Louis F. Swift,

Edward F. Swift and Edward Tilden as such executors to collect and secure all and singular the goods and chattels, rights and credits which were of the said Gustavus F. Swift at the time of his decease in whosesoever hands or possession the same may be found, in this state, and well and truly to perform and fulfill all such duties as may be enjoined upon them by the said will, so far as there shall be property and the law charge them, and in general to do and perform all other acts which now or hereafter may be required of them by law.

Witness, Patrick J. Cahill clerk of the Probate Court, of said County of Cook, and the seal of said court, this 2nd day of May, A. D 1903.

Patrick J. Cahill,
(L. S.) *Clerk.*

60 State of Illinois, } ss.
County of Cook. }

I, Mitchell C. Robin, clerk of the Probate Court of Cook County, in the state aforesaid, do hereby certify that the within is a true and correct copy of the last will and testament of Gustavus F. Swift, deceased, and of letters testamentary issued thereon, on the 2nd day of May, A. D. 1903, to Louis F. Swift, Edward F. Swift and Edward Tilden now in force, as it appears from the originals on file, and from the records of the Probate Court, in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the said Probate Court at Chicago, in said County, this 28 day of April, A. D. 1938.

(Sgd.) Mitchell C. Robin,
(Seal) *Clerk.*

61 EXHIBIT 2.

In the Matter of the Estate of
Gustavus F. Swift, Deceased.
Docket 71
Page 156
File 3-7612

This day came Louis F. Swift, Edward F. Swift and Edward Tilden, Executors of the last will and testament of Gustavus F. Swift, deceased, and presented to the court their final account with the Estate of said decedent showing receipts, including the sum of $199,773.46, balance on hand as shown by the first account approved herein, amounting to $2,388,888.46, and disbursements, including the sum of $1,220,000.00 paid to the legatees under the will of said decedent, amounting to $2,211,204.22, leaving a balance on hand amounting to $177,684.24. Said Executors also made part of said final account an itemized list of stocks, bonds and other securities remaining in their hands belonging to said estate.

Said Executors also presented to the court and filed herein due proof of notice of the presentation of said final account to this court to the minor heir at law of
62 said decedent, and the appearance of the adult heirs at law who consent to the approval of said final account and the discharge of said Executors. And the court having examined said final account, and it appearing to the court that certain claims not allowed by this court against said Estate have been paid out of funds belonging to said Estate, and on proof made in open court that they are just claims against said Estate, it is ordered that said payments be allowed. And it further appearing to the court that a widow's award amounting to $40,000.00 has been allowed and approved in said Estate, and it further appearing to the court that under the provisions of the will for the widow of said decedent, a widow's award is barred, and no renunciation of said provisions having been filed by said widow, it is ordered that so much of the order of this court as approves said widow's award be and the same is hereby vacated and set aside, and that said widow's award be and it is hereby disallowed by the court, and it is further ordered that said final account be approved and recorded.

And it now appearing to the court that more than

two years have elapsed since the issues of letters testamentary herein; that all assets of said estate have been collected or accounted for in kind; that all claims allowed by this court against said Estate have been paid; that the claim of Minna Feuerbacher, heretofore disallowed, and upon which an appeal to the Circuit Court was prayed and allowed, has been dismissed in said court, and a transcript of said dismissal has been filed in this court; that all legacies under the will of said dece-
63 dent have been paid, except that of Harold H. Swift, a minor, which is held by said Trustees under said will; that the widow's award allowed in said Estate had been disallowed; that the inheritance tax levied and assessed on said Estate has been paid; that the funeral expenses of said decedent and all costs of administration herein have been paid, it is ordered that the balance of said Estate in cash and in kind, to-wit:

(Here follows a detailed schedule showing, among other assets, the assets described in Paragraph (3) of the stipulation to which this Exhibit is attached.)

be turned over by said Executors to themselves as Trustees under the will of said decedent, in accordance with the provisions of said will.

And it is further ordered that said executors have leave to withdraw all vouchers, same having been filed, with the understanding that they shall be r turned to the files when so ordered by the court.

Now comes Louis F. Swift, Edward F. Swift and Edward Tilden, said Executors, and file their joint receipt as such Trustees for the balance of said Estate in cash and in kind as shown by said final account, whereupon, it is ordered that said Estate be declared settled, and that said executors be and they are hereby discharged.

Entered December 11, 1905.

(Signed) Charles S. Cutting,
Probate Judge.

19 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—72216, 90338-90344) * *

Francis E. Baldwin, Esq., John E. Brown, Esq., and James A. Councilor, C. P. A., for the petitioners.

Brooks Fullerton, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION.

SMITH: These proceedings are for the redetermination of deficiencies in income tax for 1930 as follows:

Docket No.	Petitioner	Deficiency
72216	Jeremiah D. Maguire and Ruth S. Maguire	$71,429.62
90338	Harold H. Swift	82,633.95
90339	Gustavus F. Swift	50,981.70
90340	Charles H. Swift	74,212.41
90341	Charles H. Swift, et al., Executors of Edward F. Swift	88,905.87
90342	Louis F. Swift, Jr., et al., Executors of Louis F. Swift	90,884.49
90343	Helen Swift Neilson	86,840.59
90344	George H. Swift	78,163.28

The principal issue involved, which is common to all of the proceedings, is the determination of the taxpayers' gain in 1930 or, more specifically, the basis to be used in computing the taxable gain, from the sale by the taxpayers trustees of certain assets which were distributed to the taxpayers by the testamentary trustees of the residuary estate of taxpayers' father, Gustavus F. Swift. The petitioners admit that they are liable to income tax on all of such gains. All of the essential facts pertaining to this issue have been stipulated.

A further issue, which involves the petitioner Helen Swift Neilson, Docket No. 90343 only, is whether that petitioner sustained a deductible loss in 1930 on account of the capital stock of the Package Car Corporation becoming worthless in that year. A separate stipulation of facts and separate briefs have been submitted in respect of the latter issue.

Other issues raised in the petitions and answers have either been settled by stipulation or withdrawn and will be disposed of accordingly under Rule 50 settlement.

Owing to the unrelated nature of the issues to be determined they will be discussed separately.

20. *Gain on sale of assets acquired from trustees of residuary estate of Gustavus F. Swift.*

The evidentiary or primary facts pertaining to this issue are summarized in substantially the same manner in the briefs submitted by the petitioners and the respondent. In their reply brief the petitioners state:

> * * * Petitioners have no objection to the finding of the primary facts requested, but object to the finding of the ultimate facts requested by Respondent.

The respondent's requested findings of primary facts to which the petitioners thus agree read as follows:

Findings of Fact.

(1) Gustavus F. Swift died testate, a resident of Illinois, on March 29, 1903. He left nine children surviving him, one of whom died on October 19, 1911. The petitioners in these proceedings (or the petitioners' decedents) are the eight children of Gustavus F. Swift surviving on March 1, 1913, and also on March 29, 1923. Ann M. Swift, the wife of Gustavus F. Swift, died on May 19, 1922.

(2) The last will and testament of Gustavus F. Swift was probated on May 2, 1903, in Cook County, Illinois. Said last will and testament, after making certain specific bequests, devised and bequeathed to Louis F. Swift, Edward F. Swift and Edward Tilden, as executors and trustees, the residue of decedent's estate. It directed said executors and trustees to pay all debts, to make certain payments annually commencing with the date of the testator's decease and continuing until the final distribution of the estate, to make certain partial distributions after the payment of all debts had been completed, and, by clause 8 of said will, directed said executors and trustees

> "to make a final distribution of all the rest and residue of my estate among my wife and children, at any time in their judgment and discretion after the expiration of ten (10) years from and after the date of my decease, but not before, and, in any event, not later than twenty (20) years thereafter, giving to my wife the one-third part thereof, the balance to be equally divided among my children, share and share alike, and should my wife not be living at the time of such distribution, then the same shall be divided

equally among my children, share and share alike, the descendants of any deceased children in such distribution to take the proportion of their deceased parent, * * *."

(3) On December 11, 1905, the final account of the executors of said last will and testament was presented to and approved by the Probate Court of Cook County, Illinois. Pursuant to order of said Probate Court, entered on December 11, 1905, approving the final account and discharging said executors, said executors turned over to themselves, as trustees under said last will and testament, all of the residue of the estate of Gustavus F. Swift. Included in such residue were the following assets, which said executors on December 11, 1905, transferred to themselves as trustees under said last will and testament:

	Number of Shares
Capital Stock	
Union Terminal Railroad Company	2,500
North Kansas City Development Company	333⅓
Union Depot Bridge & Terminal Railway Company (Common)	83⅓
Union Depot Bridge & Terminal Railway Company (Preferred)	5,876⅔
Kansas City Ferry Company	10⅔
Guinotte Land Company	66⅔
	Face Value
Bills Receivable	
Notes of Union Depot Bridge & Terminal Railway Company, dated March 2, 1903, due 6 months after date, bearing interest at 5 per cent per annum aggregating in face value	$331,147.25
Note of Union Depot Bridge & Terminal Railway Company, dated March 13, 1903, due September 2, 1903, bearing interest at 5 per cent per annum, face value	8,000.00

Upon said notes of Union Depot Bridge and Terminal Railway Company, aggregating $339,147.25 in face value, payment of $113,049.08 principal and $3,827.74 interest was received on November 21, 1903, and said payment so endorsed on said notes.

(4) Between December 11, 1905, and March 29, 1923, said testamentary trustees administered said assets so transferred to them, under said last will and testament, as described in paragraph (3) of this stipulation. During said period, said testamentary trustees acquired certain additional assets listed as follows:

	Number of Shares
Common Stock	
Union Terminal Railroad Company	2,500
North Kansas City Land & Improvement Company	600
Parkside Land Company	500
Preferred Stock	
Union Depot Bridge & Terminal Railway Company	666⅔

in consideration for money advanced by said testamentary trustees to the corporations mentioned in the above list. In each case the amount of money advanced was less than the fair market value on March 29, 1923, of said securities so acquired. The fair market value on March 1, 1913, of such of said securities as were issued prior to that date, was less than the fair market value of said securities on March 29, 1923.

(5) Pursuant to the requirement of clause 8 of said last will and testament, said testamentary trustees, on March 29, 1923, made a distribution of the assets then held by said trustees to the eight children of the testator surviving on that date. Included in such assets were the following assets which were so distributed to the petitioners (or petitioners' decedents) in these proceedings:

Common Stock, Union Terminal Railroad Company	5,000 shares
Accounts Receivable, Union Terminal Railroad Company—Face Value	$964,113.27

Said assets so distributed were transferred by the petitioners (or petitioners' decedents) to trustees of Union Terminal Trust on March 29, 1923, and held by said trustees until, on January 2, 1930, said assets were sold for a total consideration of $4,600,000.00.

(6) Included in the assets so distributed to the petitioners (or petitioners' decedents) in these proceedings on March 29, 1923, were the following assets:

Capital Stock:		
Union Depot Bridge & Terminal Railway Company (Preferred)	6,543	Shares
Union Depot Bridge & Terminal Railway Company (Common)	68-1/2	Shares
North Kansas City Development Company	333-1/3	Shares
North Kansas City Land & Improvement Company	600	Shares
Parkside Land Company	500	Shares
Guinotte Land Company	66-2/3	Shares
Kansas City Ferry Company	10-2/3	Shares
Notes Receivable:		
Union Depot Bridge & Terminal Railway Company—Face Value	$417,314.32	
North Kansas City Development Company—Face Value	1,670,334.83	

(7) Said assets so distributed were transferred by the petitioners (or petitioners' decedents) to trustees of Swift Family Realty Trust on March 29, 1923, and held by said trustees until, on November 4, 1929, said assets were sold for a total consideration of $6,500,000.00, of which $2,600,000.00 was paid on November 9, 1929, and $3,900,000.00 was paid on October 16, 1930.

(8) The fair market value, as of March 1, 1913, of the assets so sold by said Union Terminal Trust on January 2, 1930, adjusted to the date of sale, was $1,164,660.70. The fair market value, as of March 29, 1923, of said assets, adjusted to the date of sale, was $1,988,863.28. The fair market value of said assets as of December 11, 1905 when received by said testamentary trustees, adjusted to the date of sale was $1,212,899.71.

(9) The fair market value, as of March 1, 1913, of the assets so sold by said Swift Family Realty Trust on November 4, 1929, adjusted to the date of sale, was $3,221,232.58. The fair market value, as of March 29, 1923, of said assets, adjusted to the date of sale, was $4,499,332.00. The fair market value of said assets as of December 11, 1905 when received by said testamentary trustees was less than the March 1, 1913 value thereof.

(10) The trustees of Union Terminal Trust and the trustees of the Swift Family Realty Trust reported and paid tax on the gain which each group of trustees believed to be due on the sales here involved. Timely claims were

filed and are still pending for refund of all taxes paid by both groups of trustees for the year 1930. The trustees of the Swift Family Realty Trust filed no claim for refund of tax paid on the gain reported for 1929. No one of the petitioners in his income tax return filed for 1929 or for 1930 reported, or paid any tax in respect of, gain on the sales here involved.

22 The Board also makes the following findings:

11. In its income tax return for 1929 the Swift Family Realty Trust reported in its income for that year 40 per cent of the net gain realized from the sale on November 4, 1929, of the assets which were sold for a total consideration of $6,500,000, the 40 per cent representing that percentage of the consideration received in 1929. In its income tax return for 1930 the Swift Family Realty Trust reported 60 per cent of the capital net gain from the sale, that percentage representing the total part of the consideration received in 1930.

12. "During the calendar year 1930, said Swift Family Realty Trust paid a commission of $24,000 upon said sale consummated on November 4, 1929. Said Swift Family Realty Trust kept its books of account on the cash receipts and disbursements basis during the calendar years 1929 and 1930." (Paragraph (20) of stipulation of facts.)

13. "If the basis for determining the profit from the sale of said assets so sold by said Union Terminal Trust be decided by the Board to be the fair market value thereof at March 29, 1923, the Board may find that the profit from such sale is $2,611,136.72, of which one-eighth, or $326,392.09, is taxable as capital gain to each petitioner herein in the calendar year 1930." (Paragraph (14) of stipulation of facts.)

14. "If the basis for determining the profit from the sale of said assets so sold by said Swift Family Realty Trust, as described in paragraph (16) of this stipulation, be decided by the Board to be the fair market value thereof at March 29, 1923, the Board may find that the profit realized in 1930 from such sale is $1,176,400.20, of which one-eighth, or $147,050.02, is taxable as capital gain to each petitioner herein in the calendar year 1930." (Paragraph (22) of stipulation of facts.)

OPINION.

Although the Union Terminal Trust and the Swift Family Realty Trust returned as taxable income the capital gains realized by those trusts in 1930 the petitioners now admit that they are taxable upon the capital gains realized by the trusts in 1930 which is in accordance with the determination of the respondent. Each petitioner is, therefore, taxable upon one-eighth of the total capital gain realized by the trusts in 1930.

The only question presented to the Board for decision upon the main issue is whether the basis for computing the gain from the sale of the assets by the trusts is the fair market value of the assets on March 29, 1923, when the assets were distributed by the testamentary trustees to the beneficiaries, the taxpayers herein, as claimed by the petitioners, or the fair market value of the assets on December 11, 1905, when the assets were delivered by the executors to themselves as trustees, or the March 1, 1913, value of the assets, whichever is greater, as contended by the respondent.

Section 113 (a) (5) of the Revenue Act of 1928 reads as follows:

> Basis For Determining Gain Or Loss.
>
> (a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—
>
> * * * * * *
>
> (5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or

upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death.

The property here in question consisting of shares of capital stock of corporations and notes and accounts receivable was personal property acquired by the taxpayers by a general devise, not by "specific bequest," under the will of their father and the basis prescribed by the statute is "the fair market value of the property at the time of the distribution to the taxpayer." The difference between the petitioners and the respondent is "the time of distribution" to the taxpayers of their interests in the residuary estate of their father.

The respondent points to the fact that during the period when the residuary estate of Gustavus F. Swift was held by the testamentary trustees from December 11, 1905, to March 29, 1923, there was an increase in the value of the trust assets and that the testamentary trustees acquired additional assets during that period. He argues that to the extent that there was an increase in the value of the residuary estate during the period that it was held by the testamentary trustees such increase in value entirely escapes income tax if the value at March 29, 1923, is used as the basis. He submits that this was not the intention of Congress when it incorporated into the Revenue Act of 1928 section 113 (a) (5).

The language of the statute above quoted, however, is clear and unambiguous. The basis laid down by the statute is "the fair market value of the property at the time of the distribution to the taxpayer." The respondent submits that the executors distributed the assets of the estate to the testamentary trustees on December 11, 1905, and that that distribution was the distribution referred to by the statute. The law says, however, "distribution to the taxpayer." The testamentary trust was not the taxpayer. The taxpayers are the petitioners herein, or their decedents, to whom the assets were distributed by the testamentary trustees on March 29, 1923.

The question as to when the distribution of property takes place under facts similar to those here involved has been considered by the Board and the courts in a number of

cases. In *Ralph W. Harbison*, 26 B. T. A. 896 (reversed on another point in *Harbison* v. *Commissioner*, 68 Fed. (2d) 1004), on facts not materially different from those in the instant case, we held, after reviewing the legislative history of section 113 (a) (5) of the 1926 Act and the decision of the Supreme Court in *Brewster* v. *Gage*, 280 U. S. 327, that the time of distribution to the taxpayers and therefore the basic valuation date under the statute was the date on which the property was distributed to them upon the termination of the testamentary trust created by the will of their father and not the March 17, 1913, value as the Commissioner contended. To the same effect is *Arthur E. Braun, Trustee*, 29 B. T. A. 1161; *Harwood Robbins*, 33 B. T. A. 880; *Robert A. Taft, Trustee*, 34 B. T. A. 603; affd., *Commissioner* v. *Taft* (C. C. A., 6th Cir.), ... Fed. (2d) ....., decided January 10, 1939; *Margaret E. B. Fleming*, 36 B. T. A. 773; *Haskell* v. *Commissioner*, 78 Fed. (2d) 869; certiorari denied, 296 U. S. 652; *Van Nostrand* v. *United States*, 18 F. Supp. 295; affd., 94 Fed. (2d) 510; *Commissioner* v. *Libbey* (C. C. A., 1st Cir.), ... Fed. (2d) ....., decided December 28, 1938. In *Harwood Robbins, supra*, we said:

> The phrase "the time of the distribution" as used in the 1928 Act must necessarily relate to the time at which the property is actually delivered to or made available for the use of the distributee or someone acting for him by the executors, administrators, or others having lawful possession or control thereof. • • •

24 In *Commissioner* v. *Libbey, supra*, the court held that the basis for computing gain or loss on the sale in 1932 of shares of stock distributed to the taxpayer in 1921, by trustees of her father's estate, was the value of the shares of stock at the time of the actual distribution to the taxpayer in 1921. Respondent states in his brief in these proceedings that the *Libbey* case is not distinguishable from the case at bar.

Upon authority of the cited cases we hold that the time of the distribution to the taxpayers of the property which they acquired from the residuary trust estate created by the will of their father was the time at which it was distributed to them by the testamentary trustees upon termination of the trust estate on March 29, 1923. The contentions of the petitioners on this issue are therefore sustained and the tax liabilities as to petitioners' gain on the sale of these assets will be redetermined in accordance with the stipulation as to the value of such assets on the basic date.

Loss on stock of Package Car Corporation.

As stated above, this issue is involved in only one of the above proceedings, that of Helen Swift Neilson, Docket No. 90343. The term petitioner as hereinafter used will refer to Helen Swift Neilson.

The evidentiary facts pertaining to this issue have also been stipulated and the findings of facts requested in the briefs of petitioner and respondent, except for requests for ultimate facts, differ only in minor respects.

FINDINGS OF FACT.

On her income tax return for the calendar year 1930 the petitioner deducted as a loss $11,875 representing the cost of 475 shares of common stock and 95 shares of 7 percent preferred stock of Package Car Corporation which she had acquired on April 28, 1927. In determining the deficiency herein the respondent disallowed the deduction on the ground that the stock of the Package Car Corporation was worthless as of December 31, 1928.

The Package Car Corporation was incorporated as "The Pac-Age-Kar Corporation" on May 1, 1925, under the laws of the State of Illinois. The name was changed in 1927 to "Package Car Corporation." The corporation was organized to engage in the business of designing, developing, manufacturing, and selling a novel and improved type of automotive trucks for the transportation and delivery of package merchandise.

At or about the time of its organization the corporation acquired a sub-license under certain patents, covering certain improvements in motor vehicles, an internal combustion motor, a steering mechanism, and a transmission and locking mechanism. The development of the proposed automotive truck under the sub-licenses referred to was never successful. Such sales of trucks as were made were on an experimental basis and the corporation lost money from its inception.

On October 21, 1926, the corporation entered into a contract with the Mechanical Manufacturing Company of Chicago, Illinois, hereinafter referred to as the Manufacturing Company, to manufacture and assemble all mechanical parts of the motors for its trucks on a cost plus basis. The Package Car Corporation was never able to meet its obligations under this contract. On March 21, 1927, it entered into two new contracts with the Manufacturing Company whereby, under one of such contracts, the Manufacturing

Company agreed to manufacture for the Package Car
25 Corporation all other parts of the trucks, that is, all parts in addition to the motor parts which it was already manufacturing, and, under the other, the Package Car Corporation issued to the Manufacturing Company 18,437 shares of its own stock. The last mentioned contract recites that—

Now, Therefore, in consideration of and as one of the chief inducements to Mechanical Manufacturing Company to enter into and sign the above mentioned contract of even date herewith, and in settlement of second party's above mentioned claim for damages arising out of the breach of the first party of the above mentioned contract dated the 21st day of October, A. D. 1926, first party hereby agrees to issue to said second party Eighteen Thousand Four Hundred Thirty-seven (18,437) shares of the common stock of the Pac-Age-Kar Corporation fully paid and nonassessable.

The Package Car Corporation was never able to meet its obligations under its contracts with the Manufacturing Company and at all times during the years 1928 and 1929, because of such defaults, the contracts were subject to cancellation on 15 days' notice by the Manufacturing Company.

At December 31, 1928, the Package Car Corporation was indebted to the Manufacturing Company for monies advanced to it in the aggregate amount of $507,634.86. Its balance sheet as of that date showed the following assets and liabilities:

Assets.

Cash and Accounts Receivable		$ 12,861.20
Inventories:		
Materials	$ 16,062.77	
Unexpired Insurance	658.58	16,721.35
Fixed Assets:		
Patterns, Jigs, Dies and Fixtures	$169,420.60	
Display Cars	7,912.33	
	$177,332.93	
Less Depreciation	149,435.67	27,897.26
Mechanical Manufacturing Company Contract		92,185.00
Total Assets		$149,664.81

Liabilities.

Accounts Payable:		
Due Mechanical Manufacturing Company	$507,634.86	
Miscellaneous	4,165.37	$511,800.23
Capital Issued:		
Preferred	$157,600.00	
Common	171,585.00	329,185.00
Total Liabilities		$840,985.23
Deficit		691,320.42
		$149,664.81

During the calendar year 1929 the Manufacturing Company advanced further amounts to the Package Car Corporation as follows:

January	$ 5,000.00	
February	6,000.00	
March	14,500.00	
April	2,700.00	
May	2,800.00	
June	18,800.00	
July	2,400.00	
August	28,000.00	
September	11,800.00	
October	150.00	
November	18,070.00	$110,220.00

The Package Car Corporation's balance sheet as of December 31, 1929, was as follows:

Assets.

Current Assets:		
Accounts Receivable — Customers	$ 568.10	
Cash in Bank	796.69	
Prepaid Insurance	228.24	$ 1,593.03
Fixed Assets:		
Office Furniture and Fixtures	$ 1,115.30	
Automobiles	100.00	
	$ 1,215.30	
Less Depreciation	298.24	917.06
Mechanical Manufacturing Company Contract		92,185.00
Total Assets		$94,695.09

26 Liabilities.

Current Liabilities:		
Accounts Payable	$ 2,130.00	
Notes Payable Mechanical Manufacturing Company	616,784.31	$618,914.31
Capital Stock:		
Preferred	$157,600.00	
Common	171,585.00	329,185.00
Deficit		(853,404.22)
Total Liabilities		$ 94,695.09

An annual meeting of the stockholders of the Package Car Corporation was held on January 30, 1930, directors were elected for the ensuing year, and a report from the president of the corporation was read, which stated after reviewing the unsuccessful history of the company:

In addition to above advanced by Mechanical Manufac-

turing Company [the amount of $730,953.31], that Company is carrying on its books, chargeable to your Company, the following items:

Semi-finished Materials	$124,692.00
Undistributed Overhead	176,089.00
Total	$300,781.00

The Mechanical Manufacturing Company has informed us that your Company cannot look to them for further funds or credit, and the questions before this meeting are:

(a) Shall we salvage as much as possible and liquidate the Company? or

(b) Shall we attempt to re-finance and endeavor to find some means of raising funds which will permit completion of the development work necessary to make the package car a commercial success, and, if so, how shall this be done?

A special committee was appointed to make investigations and work out some plan of procedure.

At a special meeting of the stockholders held June 26, 1930, the special committee appointed at the regular stockholders' meeting of January 30, 1930, reported that it had no suggestions to make. The president stated that the company was insolvent and might as well be dissolved and a resolution to dissolve was offered and adopted. The dissolution of the corporation was completed during the calendar year 1930.

In her income tax returns for 1928 and 1929 the petitioner, Helen Swift Neilson, reported net losses for the respective years of $263,935.72 and $204,714.22 and her returns were accepted without change by the Commissioner.

The capital stock of the Package Car Corporation was worthless at December 31, 1929.

OPINION.

It is the respondent's contention that the capital stock of the Package Car Corporation became worthless in a year prior to the taxable year 1930. In his deficiency notice he determined that it was worthless at December 31, 1928.

The statute permits the deduction of losses sustained during the taxable year and not compensated for by insurance or otherwise if incurred in trade or business, or in any transaction entered into for profit. See section 23 (e) (1) and (2) of the Revenue Act of 1928. Article 174 of Regulations 74 provides that no deductible loss results from the mere shrinkage in value of stock but "if stock of a corporation becomes worthless, its cost or other basis determined under section 113 may be deducted by the owner in the taxable year in which the stock became worthless, provided a satisfactory showing of its worthlessness be made, as in the case of bad debts."

If the stock of the Package Car Corporation did not become worthless during the year 1930 then the loss to the petitioner of her investment in it was not *sustained* during that taxable year and is not deductible under the statute. The deduction must be taken in the year during
27 which the stock became worthless. *De Loss* v. *Commissioner*, 28 Fed. (2d) 803; certiorari denied, 279 U. S. 840; *Jessie S. Meachem*, 22 B. T. A. 1091; *Harry C. Kayser*, 27 B. T. A. 816; *Walter E. Kramer, Executor*, 27 B. T. A. 1043; *Claude D. Cass*, 32 B. T. A. 713; affd., 83 Fed. (2d) 841; *Sol H. Goldberg*, 36 B. T. A. 44. Our question, then, is, did the stock of the Package Car Corporation become worthless during the year 1930? We think that it did not. The evidence of record shows beyond doubt that the stock was worthless long prior to December 31, 1929. Whether it became worthless during 1929 or 1928 or in a prior year we do not need to determine, since only the year 1930 is before us in this proceeding. The evidence is that at the close of 1929 the corporation's assets, other than the contract with the Manufacturing Company, were listed in its balance sheet as of December 31st of that year at a value of only $2,510.09, while the outstanding notes payable to the Manufacturing Company amounted to over $616,000. Although the contract referred to was listed in the balance sheet at a value of $92,185, there is no evidence that it had an actual value of that amount or of any other amount. Since at all times during 1928 and 1929, as it is stipulated, the corporation was in default under its contracts with the Manufacturing Company and the contracts were subject to cancellation on 15 days' notice by the Manufacturing Company, it is not likely that they had any value whatever at the close of 1929.

We are not unmindful that the Package Car Corporation was in an experimental or development stage during its entire existence. Under such circumstances ample time should be allowed for the undertaking to materialize before the stock is deemed to be worthless. As long as the directors and stockholders have any reasonable hope or expectation of ultimate success and business operations are continued with that in view the capital stock of the corporation should not be said to be worthless merely because the liabilities exceed the assets. Apparently, though, the business undertaken by the Package Car Corporation had failed beyond question by the close of 1929. After four years of unsuccessful effort the company was hopelessly insolvent and was being financed by its chief creditor, the Manufacturing Company. Apparently it was in November or December, 1929, that the Manufacturing Company itself abandoned hope and withdrew its financial support. It made no further advances to the corporation after November, 1929. The evidence before us suggests no reason for expectation that the condition of the corporation would ever improve after the close of 1929. So far as is shown there were no outstanding orders to be filled and no prospect of new business.

Petitioner makes the argument on brief that the withdrawal of credit by the Manufacturing Company was the "identifiable event" which fixed the loss, and that since this circumstance was not "brought to the petitioner's knowledge" until some time during the taxable year 1930 she is entitled to deduct her loss in that year. This contention is contrary to the rule above stated that the loss must be taken in the year when the stock becomes worthless. We said in *S. G. Armstrong,* 24 B. T. A. 321:

> * * * The ascertainment of a loss within a taxable year is not the criterion imposed by the statute for a loss deduction. Such deductions are allowable only in the year in which the loss is sustained. See *Lemuel S. McLeod,* 19 B. T. A. 134. Cf. *F. W. Darling,* 19 B. T. A. 337; affd., 49 Fed. (2d) 111; certiorari denied, 283 U. S. 866; *Edward H. R. Green,* 19 B. T. A. 904; *Leigh Carroll,* 20 B. T. A. 1029; *Lucas* v. *American Code Co.,* 280 U. S. 445. There is nothing to show that the petitioner did not sustain the loss in question prior to the taxable year before us, and upon this consideration of the claimed deduction we must approve the respondent's disallowance of same.

28 Respondent suggests that the failure of the petitioner to take the loss deduction in one of the prior years, 1928 or 1929, may be due to the fact that she reported in her returns large net losses for both those years without the benefit of such deduction. However that may be, we think that the evidence here amply supports the respondent's determination that the shares of stock in question did not become worthless during 1930 and that the loss was therefore not sustained in that year. On this issue the respondent is sustained.

Judgments will be entered under Rule 50.

Enter:

Entered Jan. 28, 1939.

29 UNITED STATES BOARD OF TAX APPEALS. Entered Mar. 29, 1939.

* * (Caption—72216) * *

DECISION.

Pursuant to the Memorandum Findings of Fact and Opinion of the Board entered February 28, 1939, the respondent herein having on March 21, 1939, filed a recomputation and the petitioner having on March 27, 1939, filed an acquiescence therein, now therefore, it is

Ordered and Decided: That there is a deficiency in income tax for the year 1930 in the amount of $46,443.60.

Enter:

(Signed) Charles P. Smith,
Member.

Entered Mar 29 1939.

30 UNITED STATES BOARD OF TAX APPEALS. Filed June 21, 1939.

* * (Caption—72216) * *

STIPULATION OF VENUE.

Filed June 21, 1939.

Pursuant to the provisions of Section 1002 of the Revenue Act of 1926, as amended by Section 519 of the Revenue Act of 1934, it is hereby agreed and stipulated that the decision of the United States Board of Tax Appeals

in this proceeding may be reviewed by the United States Circuit Court of Appeals for the Seventh Circuit.

(Signed) James W. Morris,
Assistant Attorney General.
(Signed) J. P. Wenchel,
RLW
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.
(Signed) Francis E. Baldwin,
Attorney for Respondents on Review.

Filed June 21, 1939.

31 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Guy T. Helvering, Commissioner of Internal Revenue, *Petitioner on Review,* *vs.* Jeremiah D. Maguire and Ruth S. Maguire, *Respondents on Review.*	B. T. A. Docket No. 72216.

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, James W. Morris, Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Charles E. Lowery, Special Attorney, Bureau of Internal Revenue, and respectfully show:

I.

Jurisdiction.

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States; that the respondents on review, Jeremiah D. Maguire and Ruth S. Maguire (hereinafter referred to as the tax-

payers), are citizens of the United States and residents of New York, New York. The taxpayers filed their joint Federal income tax return for the taxable year 1930 with the Collector of Internal Revenue for the Third New York District, whose office is located in the City of New York, New York, and within the judicial circuit of the United
32 States Circuit Court of Appeals for the Second Circuit. By a stipulation signed by the parties and filed with the United States Board of Tax Appeals, it has been agreed that the decision of the said Board in this proceeding may be reviewed by the United States Circuit Court of Appeals for the Seventh Circuit.

The Commissioner files this petition pursuant to the provisions of Section 1002 of the Revenue Act of 1926, as amended by Section 519 of the Revenue Act of 1934.

II.

Prior Proceedings.

On March 13, 1933, the Commissioner determined a deficiency in Federal income tax against the taxpayers for the year 1930 in the amount of $71,429.62, and sent to the taxpayers, by registered mail, a notice of said deficiency in accordance with the provisions of Section 272 of the Revenue Act of 1928. Thereafter and on May 11, 1933, the taxpayers filed an appeal from the said determination of the Commissioner with the United States Board of Tax Appeals.

The case was duly tried to the United States Board of Tax Appeals and on February 28, 1939, the Board entered its memorandum findings of fact and opinion, pursuant to which opinion decision was entered on March 29, 1939, wherein and whereby it was ordered and decided that there is a deficiency in income tax for the year 1930 in the amount of $46,443.60.

III.

Nature of Controversy.

The question involved in this petition for review has to do with the taxable gain realized by the taxpayers in
33 1930 as the result of the sale by trustees of certain assets that were distributed to the children (of whom Ruth S. Maguire is one) of Gustavus F. Swift, deceased, by testamentary trustees of his residuary estate. Briefly stated the facts are as follows:

Gustavus F. Swift died testate in 1903. By his will he

left a residuary estate in trust for his wife and children to "be divided equally" among his children should his "wife not be living at the time of such distribution". The residuary estate was turned over to the testamentary trustees by the executors on December 11, 1905, after appropriate discharge of the executors by the Probate Court. From the latter date until March 29, 1923, the testamentary trustees administered the assets of the trust and on the latter date distributed the trust corpora to the eight children of the testator who then survived. On the latter date (March 29, 1923) the beneficiaries of the said testamentary trust in turn transferred certain of the assets so received by them to two trusts (Union Terminal Trust and Swift Family Realty Trust). The assets transferred to the Union Terminal Trust were sold on January 2, 1930, for $4,600,000.00 and the assets transferred to the Swift Family Realty Trust were sold on November 4, 1929, for $6,500,000.00, of which latter amount $2,600,000.00 was paid on November 9, 1929, and $3,900,000.00 was paid on October 16, 1930. The gains arising from these sales, as determined by the respective trustees, were reported and taxes were paid thereon by the trustees, whereas no one of the individual beneficiaries returned in his (or her) income tax return any portion of the gain so derived. The taxpayers now concede, however, that they are taxable on the capital gain realized "if
34 the basis for determining the profit from the sale of said assets so sold * * * be the fair market value thereof at March 29, 1923" the date on which it was claimed by them that distribution occurred within the meaning of the statute (Sec. 113(a)(5) of the Revenue Act of 1928). The values of the involved assets on all material dates were stipulated by the parties.

The Commissioner determined that the date of distribution was December 11, 1905, when the executors turned over to themselves, as testamentary trustees, all of the residue of the estate of Gustavus F. Swift, deceased. The Board of Tax Appeals agreed with the taxpayers' contention that the date of "distribution to the taxpayer" was March 29, 1923, when the assets were distributed by the testamentary trustees to the beneficiaries.

IV.

Assignments of Error.

The Commissioner avers that in the record and proceedings before the United States Board of Tax Appeals and

in the opinion and final decision rendered and entered by the United States Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the Commissioner who now assigns the following errors and each of them, which he avers occurred in said record, proceedings, opinion, and final decision so rendered and entered by the United States Board of Tax Appeals:

1. The United States Board of Tax Appeals erred in ordering and deciding that there is a deficiency in income tax for the year 1930 in the amount of only $46,443.60.

2. The United States Board of Tax Appeals erred in holding that the date of distribution to the residuary
35 legatees of the residue of the estate of Gustavus F. Swift, deceased, was the date, namely, March 29, 1923, when the said property was transferred to the residuary legatees upon the termination of the testamentary trust created by the will of said Gustavus F. Swift, deceased.

3. The United States Board of Tax Appeals erred in failing to hold that the date of distribution to the residuary legatees of the residue of the estate of Gustavus F. Swift, deceased, was the date, namely, December 11, 1905, upon which the executors transferred said residue to themselves as testamentary trustees.

4. The United States Board of Tax Appeals erred in that its decision is not supported by the evidence and is contrary to the law.

Wherefore, the Commissioner petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Seventh Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sgd.) James W. Morris,
Assistant Attorney General.
(Sgd.) J. P. Wenchel,
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
Charles E. Lowery,
Special Attorney, Bureau of Internal Revenue.

36 United States of America
District of Columbia } ss.

Charles E. Lowery, being duly sworn, says that he is a Special Attorney in the Bureau of Internal Revenue and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

(Sgd.) Charles E. Lowery,

Sworn and subscribed to before me this 20th day of June, 1939.

(Sgd.) H. B. Linton,
Notary Public.

My commission expires April 1, 1942.

37 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—72216) * *

Filed Jul. 1, 1939.

To: Francis E. Baldwin, Esq.,
33 South Clark Street,
Chicago, Illinois.

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of June, 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 21st day of June, 1939.

(Signed) J. P. Wenchel,
RLW
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assign-

ments of error mentioned therein, is hereby acknowledged this 26th day of June, 1939.

(S) Francis E. Baldwin,
Attorney for Respondent on Review.

38 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—72216) * *

NOTICE OF FILING PETITION FOR REVIEW.

Filed Jul. 6, 1939.

To: Mr. Jeremiah D. Maguire,
Mrs. Ruth S. Maguire,
990 5th Avenue,
New York, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of June, 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 21st day of June, 1939.

(Signed) J. P. Wenchel,
RLW
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 23 day of June, 1939.

(S) Jeremiah D. Maguire,
(S) James A. Councilor (?)
Respondents on Review.

Filed July 22, 1939. 68 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

(Caption—72216)

PRAECIPE FOR RECORD.

Filed Jul. 22, 1939.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Court of Appeals for the Seventh Circuit heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of proceedings before the Board.
2. Pleadings before the Board,
(a) Petition, including annexed copy of deficiency letter.
(b) Answer and amendment to answer.
3. Findings of fact, opinion and decision of the Board.
4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
5. Stipulation of venue.
6. Stipulation of Facts (original and supplemental), including Exhibit 1 (will of decedent) and Exhibit 2 (order of Probate Court) attached thereto.
7. Certified copy of order of Court dated July 7, 1939.
8. This praecipe.

(Signed) J. P. Wenchel,
RLW
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

Statement of Service:

A copy of this praecipe was mailed to attorney for respondents on review this date, July 22, 1939.

J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 25th day of July, 1939.

(s) Francis E. Baldwin,
Attorney for Respondents on Review.

64 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * * (Caption—72216, 90338-90344) * *

Filed July 14, 1939.

65 ORDER.

Upon reading and considering the Joint Motion filed and submitted by the attorney for the petitioner and the attorney for the respondents in the above-entitled cases:

It Is Ordered:

1. That a complete record in the case of Guy T. Helvering, Commissioner of Internal Revenue, Petitioner on Review, *vs.* Jeremiah D. Maguire and Ruth S. Maguire, Respondents on Review, be transmitted and delivered to the Clerk of this Court by the Clerk of the United States Board of Tax Appeals, said record to consist of copies of the docket entries of proceedings before the Board, petition to the Board, the answer of the respondent, the stipulation of facts, the findings of fact and opinion of the Board, the final order or decision of the Board, the petition for review by this Court and proof of service of a copy thereof with notice of filing on the respondents, duly certified as correct.

2. That in each of the other of the above-entitled cases the Clerk of the United States Board of Tax Appeals shall transmit and deliver to the Clerk of this Court only copies, duly certified, of the final order or decision of the Board and the petition for review by this Court, together with proof of service of a copy thereof and notice of the filing of the same upon the respondent or respondents.

3. That the record in the case of Guy T. Helvering, Commissioner of Internal Revenue, Petitioner on Review, *vs.* Jeremiah D. Maguire and Ruth S. Maguire, Respondents on Review, to the extent material shall be used in this Court as the record on review in all eight of the above-entitled cases; the record in the said Maguire case only to be printed, and the said Maguire case only to be briefed and argued in this Court.

4. That the decision of this Court in the said case of Commissioner *vs.* Maguire be considered and held to be controlling, and to be the decision of this Court in all of the other seven cases hereinabove entitled: and that, upon the decision of this Court in the case of Commissioner *vs.* Maguire becoming final, like decisions be entered and

orders for like mandates issue in the remaining cases captioned herein upon motion of either party hereto and service of such motion upon the other party.

66 5. In the event that application shall be made by either party to the Supreme Court of the United States for a writ of certiorari in the said case of Guy T. Helvering, Commissioner of Internal Revenue, Petitioner on Review, *vs.* Jeremiah D. Maguire and Ruth S. Maguire, Respondents on Review, then, pending final disposal of said case by the Supreme Court, no Order for Mandate or Mandate shall issue in any of the other seven cases, and upon final disposition of said case by the Supreme Court, an Order for Mandate and Mandate similar to those which may be made and issued by this Court in the said Maguire case shall be made and issued by the Court in each of the said other cases.

6. The Clerk of this Court is hereby directed to transmit to the Clerk of the United States Board of Tax Appeals eight certified copies of this Order, one of such certified copies to be incorporated in the record on review of each of the causes herein and transmitted therewith to this Court by the Clerk of the United States Board of Tax Appeals at the time such records are certified and transmitted.

By the Court.

William M. Sparks,
U. S. Circuit Judge.

Dated at Chicago, Illinois, July 7, 1939.

67 UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages, numbered from 1 to 3, inclusive, contain a true copy of the order signed by Hon. William M. Sparks, Circuit Judge, on July 7, 1939, in the following cases: B. T. A. No. 72216 Guy T. Helvering, Commissioner of Internal Revenue *vs.* Jeremiah D. Maguire, et al. B. T. A. No. 90338, Guy T. Helvering, Commissioner of Internal Revenue *vs.* Harold H. Swift. B. T. A. No. 90339, Guy T. Helvering, Commis-

sioner of Internal Revenue *vs.* Gustavus F. Swift. B. T. A. No. 90340, Guy T. Helvering, Commissioner of Internal Revenue *vs.* Charles H. Swift. B. T. A. No. 90341, Guy T. Helvering, Commissioner of Internal Revenue *vs.* Charles H. Swift, et al., Executors, etc. B. T. A. No. 90342, Guy T. Helvering, Commissioner of Internal Revenue *vs.* Louis F. Swift, Jr., et al., Executors, etc. B. T. A. No. 90343, Guy T. Helvering, Commissioner of Internal Revenue *vs.* Helen Swift Neilson. B. T. A. No. 90344, Guy T. Helvering, Commissioner of Internal Revenue *vs.* George H. Swift. October Term, 1938, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 12th day of July, A. D. 1939.

Frederick G. Campbell,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

69 UNITED STATES BOARD OF TAX APPEALS

Washington.

Commissioner of Internal Revenue, *Petitioner,*
vs.
Jeremiah D. Maguire & Ruth S. Maguire, *Respondents.* } Docket No. 72116.

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 76, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 7th day of August, 1939.

B. D. Gamble,
Clerk, United States Board of Tax Appeals.

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UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 57, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the fourteenth day of September, 1939, upon which the following entitled cause was heard and determined:

Cause No. 7049

Commissioner of Internal Revenue,
Petitioner,

vs.

Jeremiah D. Maguire and Ruth S. Maguire,
Respondents,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of August, A. D. 1940.

Kenneth J. Carrick,

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

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At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit held in the City of Chicago and begun on the fourth day of October, in the year of our Lord one thousand nine hundred and thirty-eight, and of our Independence the one hundred and sixty-third.

Commissioner of Internal Revenue,
Petitioner,
7049 *vs.*
Jeremiah D. Maguire and Ruth S. Maguire,
Respondents.

Petition for Review of Decision of the United States Board of Tax Appeals.

And, to-wit: On the eighteenth day of August, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for respondents, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7049 October Term, 19....

Commissioner of Internal Revenue

vs.

Jeremiah D. Maguire and Ruth S. Maguire.

The Clerk will enter my appearance as counsel for the Respondents.

Francis E. Baldwin,
33 S. Clark St.,
Chicago, Ill.

Endorsed: Filed August 18, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the fifth day of September, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for petitioner, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7049 October Term, 19.....

Commissioner of Internal Revenue

vs.

Jeremiah D. McGuire.

The Clerk will enter our appearance as counsel for the Petitioner.

Sewall Key,
Samuel O. Clark, Jr.,
Department of Justice,
Washington, D. C.

Endorsed: Filed September 5, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-fifth day of September, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for petitioner, which said appearance is in the words and figures following, to wit:

Case No. 7049

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

..... Term, 19....

Commissioner of Internal Revenue,
Petitioner,

vs.

Jeremiah D. Maguire and Ruth S. Maguire,
Respondents.

The Clerk will enter our appearances as Counsel for the petitioner.

J. P. Wenchel,
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.
Charles E. Lowery,
Charles E. Lowery,
Special Attorney, Bureau of Internal Revenue.

Endorsed: Filed September 25, 1939. Frederick G. Campbell, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit held in the City of Chicago and begun on the third day of October, in the year of our Lord one thousand nine hundred and thirty-nine, and of our Independence the one hundred and sixty-fourth.

And afterwards, to-wit: On the thirteenth day of October, 1939, there was filed in the office of the Clerk of this Court, a stipulation relative to misleading statements in the record, which said stipulation is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Commissioner of Internal Revenue,
Petitioner,
vs.
Jeremiah D. Maguire and Ruth S. Maguire,
Respondents.
No. 7049.

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto that the following paragraphs in the Stipulation of Facts contained in the record on appeal in this case, although showing the correct figures, are misleading in their explanation thereof and that they should be deemed by this Court to read as follows:

Paragraph 13, Record 19 (which has already been amended, see Record 21) should read—

"If the basis for determining the profit from sale of said assets so sold by said Union Terminal Trust be decided by the Board to be:

(1) As to assets received by the testamentary trustees from the executors of Gustavus F. Swift, the fair market value thereof on December 11, 1905; (2) as to assets purchased by the testamentary trustees, the cost thereof to them (except that the March 1, 1913, value of assets purchased before that date shall control if it exceeded cost) then the Board may find that the profit from such sale is $3,387,100.29, of which sum one-eighth or $423,387.54 is taxable as capital gain to each petitioner herein in the calendar year 1930."

Paragraph 21, Record 20 should read—

"If the basis for determining the profit from the sale of said assets so sold by said Swift Family Re-

alty Trust, as described in paragraph (16) of this stipulation, be decided by the Board to be:

(1) As to assets received by the testamentary trustees from the executors of Gustavus F. Swift, the fair market value thereof on March 1, 1913; (2) as to assets purchased by the testamentary trustees, the cost thereof to them (except that the March 1, 1913, value of assets purchased before that date shall control if it exceeded cost);

then the Board may find that the profit realized in 1930 from such sale is $1,943,260.45, of which one-eighth, or $242,907.56, is taxable as capital gain to each petitioner herein in the calendar year 1930."

Witness the signatures of the parties hereto by their respective attorneys as of this 4th day of October, 1939.

Guy T. Helvering,
Commissioner of Internal Revenue,
By Samuel O. Clark, Jr.,
By Samuel O. Clark, Jr.,
Assistant Attorney General, Attorney for Petitioner.
Jeremiah D. Maguire,
Ruth S. Maguire,
By Francis E. Baldwin,
By Francis E. Baldwin,
Attorney for Respondents.

Endorsed: Filed October 13, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the sixth day of November, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for petitioner, which said appearance is in the words and figures following, to-wit:

Case No. 7049

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

..... Term, 19.....

Commissioner

vs.

Jeremiah D. Maguire and Ruth S. Maguire.

The Clerk will enter our appearances as Counsel for the Petitioner.

Samuel O. Clark, Jr.,
Assistant Attorney General,
Sewall Key,
Arthur A. Armstrong,
Special Assistants to the Attorney General.

Endorsed: Filed November 6, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the ninth day of February, 1940, the following further proceedings were had and entered of record, to-wit:

Friday, February 9, 1940.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

Commissioner of Internal Revenue, *Petitioner,*		Petition for Review of Decision of the United States Board of Tax Appeals.
7049	*vs.*	
Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*		

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. Arthur A. Armstrong, counsel for petitioner, and by Mr. Francis E. Baldwin, counsel for respondent, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the fifth day of March, 1940, there was filed in the office of the Clerk of this Court, the opinion of the Court which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7049. October Term, 1939, January Session, 1940.

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*

vs.

JEREMIAH D. MAGUIRE and RUTH S. MAGUIRE, *Respondents.*

On Petition for Review of Decision of the United States Board of Tax Appeals.

March 5, 1940.

Before EVANS, MAJOR and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.* This is a petition to review an order of the Board of Tax Appeals, in a proceeding for determination of an alleged deficiency in respondent's income tax for the calendar year 1930. The Commissioner of Internal Revenue had asserted a deficiency of $71,429.62. The Board on March 29, 1939 entered its order finding a deficiency in the amount of $46,443.60.

Gustavus Swift, a resident of Illinois, died on March 29, 1903. He left surviving him his widow and nine children, one of whom, Ruth S. Maguire, and her husband are the respondents herein. He left a will which was duly admitted to probate in the Probate Court of Cook County, Illinois, on May 2, 1903, in which he devised and bequeathed to his executors and trustees in trust his residuary estate, to hold the same and to pay certain payments annually commencing with the date of his death and continuing until the final distribution of his estate.

By clause 8 of his will the trustees were directed to distribute the corpus not less than ten nor more than twenty years after his death among his widow and children in certain specified proportions.

On December 11, 1905 the Probate Court of Cook County entered an order approving the final account of and discharging the executors, and directed them to turn over to themselves as trustees the balance of the estate in accordance with the provisions of the will. Thereafter, the trustees continued to administer the estate as such trustees until March 29, 1923, when the securities received by the trustees, together with other securities subsequently purchased by them, were distributed in kind to the respondent Ruth S. Maguire. Thereafter in 1929 and 1930 certain of the securities were sold.

The taxing statute provides that in the case of property *acquired after 1913* the basis for determining gain or loss is cost. § 113(a), Revenue Act of 1928, c. 852, 45 Stat. 818. However, as to real property passing by will and personal property specifically bequeathed, the basis is the value of the property at the death of the testator; except that as to personal property passing by general bequest, the basis is the "value of the property at the time of the distribution to the taxpayer." § 113(a)(5).

The taxing statute also provides that in the case of property *acquired before 1913* the basis is cost or 1913 value, whichever is greater. § 113(b). However, as to real property passing by will and personal property specifically bequeathed, the basis is value at death or 1913 value, whichever is greater; except that as to personal property passing by general bequest, the basis is value at distribution to the taxpayer or 1913 value, whichever greater. § 113(b).

In the instant case the property in question was personal property, consisting of shares of capital stock of certain corporations, certain accounts and notes receivable. Some passed under the will by general bequest, and was distributed by the executors to the testamentary trustees in 1905. Some property was purchased by the trustees between 1905 and 1913, and some was purchased between 1913 and 1923. In 1923 the testamentary trustees delivered the properties to the taxpayer.

The taxpayer reasons that the property in question was property acquired by will, and therefore the basis is its value at the time of distribution to the taxpayer. In this regard she contends that although some of the property was purchased by the testamentary trustees, it nevertheless was acquired under and pursuant to the will.[1] On the other hand, the Government argues that the property subse-

quently purchased by the trustees was acquired by purchase. As to this property the Government contends that the basis is its cost to the trustees.[2]

This court must answer two questions in this case: (1) To what does the language "distribution to the taxpayer" refer—distribution by the estate or delivery by the trust? (2) What is the proper basis of the properties received by the taxpayer? In this connection the Board of Tax Appeals agreed with the taxpayer's position, and decided that the basis was the value of the properties in 1923, at which time there was "distribution to the taxpayer."

The controversy here is over the proper construction of a section of the 1928 revenue statute to the effect that in the case of personal property passing by general bequest, the basis is the "value of the property at the time of the distribution to the taxpayer." The term "distribution" might refer to distribution by the estate. *Jenkins* v. *Smith*, 21 F. Supp. 433; Dissenting opinion, *Commissioner* v. *Libbey*, 100 F. (2) 458. Or it might refer to delivery by the testamentary trust. *Harbison* v. *Commissioner*, 26 B. T. A. 896; *Libbey* case, *supra*.

In the light of the conflict of thought on this point, we are not convinced that the express language of the statute is unambiguous and definite, as counsel for taxpayer would have us believe. Every statute is to be construed with reference to its intended scope and to the purpose of the legislature in enacting it; and where language is used which admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and carry out the purpose of the statute, being mindful, however, that it is not permissible under the pretense of interpretation

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1. Taxpayer claims that the date of acquisition, *i. e.*, before or after 1913, is immaterial in the instant case. In saying this, taxpayer proceeds on the theory that no matter when the property was acquired, the property being acquired by virtue of the will takes the basis given for property passing by will, and in this case the following occurs: if the property was acquired after 1913, the basis is the value at time of distribution (claimed to be the year 1923 when the property was delivered to the taxpayer), § 113(a)(5); if acquired before 1913, the basis is still the 1923 value (because greater than 1913 value), § 113(b). Even if the Government agreed as to the point on acquisition, it disagrees as to the date when there is distribution to the taxpayer, claiming the date to be the year 1905 when the estate was closed.

2. In greater detail the Government's contention is as follows. As to property purchased between 1905 and 1913, § 113(b) applies: the basis is cost or 1913 value whichever greater. As to property purchased between 1913 and 1923, § 113(a) applies: the basis is cost. As to these properties, each is acquired by the taxpayer in the year the trustees purchased it, and the cost in each instance is the cost to the trustees in the year of purchase.

to make a law, either by extension or restriction, which shall depart from the legislative intent. In such a situation, resort to aids outside the language itself is necessary. *Brown* v. *Duchesne*, 60 U. S. 183, 194; *Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, 464; *Helvering* v. *Morgan's Inc.*, 293 U. S. 121, 126. For instance, often one finds the answer to the controversy in legislative history.

Legislative History. The 1921 to 1926 Acts provided that the basis of property passing by will was its value at the time of such "acquisition." Considerable difficulty was experienced in determining the date of acquisition, particularly in cases where the property was sold by the estate of the decedent. See *Bankers' Trust Co.* v. *Bowers*, 23 F. (2) 941; *cf. McKinney* v. *U. S.*, 62 Ct. Cls. 180. So the language was changed, and as changed incorporated in the 1928 Act. In this connection the legislative comments are pertinent.

The House bill provided that the basis of property passing by will should be its value at the death of the testator, since the "value on the date of death affords an equitable and more readily determinable basis." Ways and Means Committee Report, No. 2, 70th Cong., 1st. Sess., p. 18 (1928 Act). The House bill thereby disposed of the confusion caused by the *McKinney* case, *supra*, by supplying the value-at-death basis to sales of property by the estate, the same basis as used where the property is sold by the beneficiary.

The Senate, however, deemed the House bill weak in one respect, in that it failed to take care of the situation where "the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis * * * for the decedent never owned the property." Finance Committee Report, No. 960, 70th Cong., 1st. Sess., p. 26 (1928 Act). Accordingly, the Senate amended the House bill.

As amended, the bill provided that the basis of property passing by will should be value-at-death, except that the basis of personal property passing by general bequest should be the value "at the time of the distribution to the taxpayer." From what has been said, it would appear that Congress was not looking beyond the distribution by the estate. Lending to this appearance is the weight given to the value-at-death rule and the reason given for the exception thereto. It is also easy to conclude that acquisition by the beneficiary was a factor in the minds of the legislators.

We quote again from the legislators:

> "In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis * * *. The same rule is applied to real and personal property transmitted by the decedent where the sale is made by the executor. In all other cases the basis is the fair market value * * * at the time of distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property * * * transmitted to the beneficiary * * * by general bequest * * *. It would also apply in cases where the executor purchases property and distributes it to the beneficiary." Conference Report, No. 1882, 70th Cong., 1st. Sess., p. 14 (1928 Act).

The change in language was incorporated in the 1928 and 1932 Acts, but the difficulty in administering the section continued. Now the difficulty was in the construction of the words "time of distribution." However, in the meantime, the former language "time of acquisition" had been judicially defined to mean "time of death" of the decedent. *Brewster* v. *Gage*, 280 U. S. 327. The reason for the 1928 change existed no longer, and in 1934 Congress reverted to the former language to the effect that in cases where property is transmitted at death the basis shall be the value at the "time of such acquisition."

Legislative comments in 1934 indicated that the change in the 1934 law was made because the reason for the 1928 language had disappeared and some evils had appeared.[3]

3. We quote material parts from the 1934 legislative reports: "Thus, where a trustee acquires personal property by general bequest, the basis of the property, on a sale by him, is the value at the time of distribution to him. The basis to the executor, in all cases, is the value of the property at the date of decedent's death.

"Often times, the executor and trustee under a will are one and the same person. Thus, in the case of a general bequest of personal property, he is in a position to make use of one basis of valuation or the other * * *. The trustee, of course, may use a later basis than the executor, and where it is desired to sell * * * the executor-trustee may determine whether it would be most advantageous to sell as executor or trustee. Where the personal property has increased in value * * * the property may be distributed to the trustee, who may use the higher basis * * * thereby diminishing the taxable increment * * *." Finance Committee Report, Senate, No. 558, 73rd Cong., 2nd Sess., pp. 34-35 (1934 Act).

The same committee added that the 1934 change made it "clear that if the property of the decedent is sold by the executor or other representative of the estate of the decedent, the basis * * * is the fair market value at the death of decedent, which is the same basis adopted * * * when the property is sold by the beneficiary."

Thus, the legislators expressed concern because the existing law permitted situations where an executor-trustee under a will could sell property either before or after distribution to himself as trustee, thereby avoiding taxable gains which accrued between the death of the testator and the distribution by the estate. No concern, however, was expressed over the consequences inherent in situations which would result from considering delivery by the trustee as the "distribution" meant by the tax statute, thereby permitting avoidance of tax gains accruing between death and distribution by the trustee. The inference is strong that Congress was not looking beyond the distribution by the estate, when it wrote the language in controversy.

"*Distribution to the taxpayer.*" As already mentioned, one often finds the meaning of words by reading their origin and purpose. The bare words "distribution to the taxpayer" tell a plain story when placed in their context and defined in the light of their history. In providing the tax basis for property transmitted at death, Congress did not intend the valuation date to go beyond the time when the estate was closed. The phrase relates to the time when the property is distributed by the executor.

Nor is logic offended by our construction. That the distribution by the estate be to a trustee for the use of the taxpayer in some cases, rather than to the taxpayer himself in every case, matters little. As a matter of logic, where the taxpayer has a substantially vested equitable ownership at the time of distribution to the trustee, then distribution to the trustee is distribution to the taxpayer. The subsequent delivery by the trustee to the taxpayer merely transfers the legal title. *Croxall's Lessee* v. *Sherrerd*, 72 U. S. 268, 281; *Merchant's Loan and Trust Co.* v. *Patterson*, 308 Ill. 519.

We conclude, therefore, that the phrase "time of distribution to the taxpayer" as used in § 113(a)(5) of the 1928 Act means time of distribution by the decedent's estate, and it follows consequently that the time of such distribution in the instant case was December 11, 1905. Moreover, the basis of the property coming to the taxpayer from the executors, through the testamentary trustees, is the 1905 value or the 1913 value of such property, which ever was greater. § 113(b).

Basis of Property Purchased by Trustees. In the instant case the property in question consists of property transmitted at death and of property subsequently purchased by the trustees under powers given in the will. The taxpayer contends that although some of the property was purchased by the trustees, nevertheless she acquired the properties by will, and therefore the properties take the basis as given in § 113(a)(5). *Fleming* v. *Commissioner*, 36 B. T. A. 773, 777; see f.n.1.

That the taxpayer's right in the properties has its source in the provisions of the will, is certain; but certain too are we that this factor does not control the application of the basis section, § 113(a)(b). For our conclusion we depend considerably on the history that has been related above. It is plain therefrom that the legislators distinguished between specific property owned by the decedent and specific property purchased after decedent's death by the trustee. And they also deemed important the time when these properties were acquired.

For our conclusion we also depend considerably on the statutory scheme. In general the statute applies a cost basis to property acquired by the taxpayer.[4] To some situations the statute applies a different basis, *e. g.*, § 113(a)(5). For instance, in the instant case, the statute makes an exception to the cost basis. This exception, however, applies only to "property transmitted at death." To us this means that the exception, *i. e.*, the value-at-death and value-at-distribution basis, is confined to the specific property owned by the testator at his death.

We conclude, therefore, that property purchased by the trustees is not "property transmitted at death," and that as to it the basis is as described in footnote #2. In this connection we may add the following explanation. Where the identical property distributed to the trustees is later delivered to the taxpayer in kind, it may be said that under the statute the taxpayer acquired the property "by will." However, where the trustees buy different property after the distribution, and this property is delivered to the taxpayer, it may be said that it was acquired by purchase and not "by will."

The order of the Board of Tax Appeals is reversed, and

4. A more accurate statement would mention that as to property acquired before 1913, the basis is cost or 1913 value, whichever greater, § 113(b).

the case remanded for further proceedings not inconsistent with the views herein expressed. It is so ordered.

REVERSED AND REMANDED.

Endorsed: Filed March 5, 1940. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the fifth day of March, 1940, the following further proceedings were had and entered of record, to-wit:

Tuesday, March 5, 1940.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

Commissioner of Internal Revenue, *Petitioner,* vs. Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*	Petition for Review of Decision of the United States Board of Tax Appeals.

7049

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the decision entered in this cause on March 29, 1939, by the United States Board of Tax Appeals be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said Board of Tax Appeals for further proceedings not inconsistent with the views expressed in the opinion of this Court.

And afterwards, to-wit: On the eighth day of March, 1940, there was filed in the office of the Clerk of this Court, a motion for extension of time within which to file a petition for rehearing, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Commissioner of Internal Revenue, *Petitioner*, *vs.* Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*	No. 7049.

MOTION.

Now come Jeremiah D. Maguire and Ruth S. Maguire, respondents in the above entitled cause No. 7049, and all of the other respondents in the other above entitled causes Nos. 7050, 7051, 7052, 7053, 7054, 7055, and 7056, by their attorneys, and move the court:

(1) That an order be entered herein extending the time to April 4, 1940, within which respondents may file a petition for rehearing upon the decision of this court in the above entitled causes, rendered on March 5, 1940.

By order entered by this court and filed July 14, 1939, the court ordered and directed that in each of the above entitled causes, other than that of Commissioner of Internal Revenue, Petitioner, *vs.* Jeremiah D. Maguire and Ruth S. Maguire, Respondents, No. 7049, the decision of this court in said cause of Commissioner *vs.* Maguire should be considered and held to be controlling, and to be the decision of this court in all of the other seven cases hereinabove entitled; and that, upon the decision of this court in the case of Commissioner *vs.* Maguire becoming final, like decisions be entered and orders for like mandates issue in the remaining cases captioned herein upon motion of either party hereto and service of such motion upon the other party.

Said order further provides that in the event application shall be made by either party to the Supreme Court of the United States for a writ of certiorari in the said case of Guy T. Helvering, Commissioner of Internal Revenue, Petitioner on Review *vs.* Jeremiah D. Maguire and Ruth S. Maguire, Respondents on Review, then, pending final disposal of said case by the Supreme Court, no Order for Mandate or Mandate shall issue in any of the

other seven cases, and upon final disposition of said case by the Supreme Court, an Order for Mandate and Mandate similar to those which may be made and issued by this Court in the said Maguire case shall be made and issued by the Court in each of the said other cases.

Respondents submit herewith, in support of this motion, the affidavit of Francis E. Baldwin.

A copy of this motion has been sent by registered mail, return receipt requested, to

Samuel O. Clark, Jr.,
Assistant Attorney General,
Sewall Key,
Arthur A. Armstrong,
Special Assistants to the Attorney General,
Counsel for Petitioner,

and request has been made that said attorneys consent to the granting of said extension.

Respectfully submitted,
Francis E. Baldwin,
Albert H. and Henry Veeder,
Attorneys for Respondents.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Commissioner of Internal Revenue, *Petitioner,* *vs.* Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*	No. 7049.

AFFIDAVIT.

State of Illinois, } ss.
County of Cook. }

Francis E. Baldwin, being first duly sworn, on his oath states that he is counsel herein for the above-named respondents; that he has prepared and makes a motion for an extension of time within which to file petition for re-

hearing in the above entitled causes, in order that there may be submitted to this Honorable Court, with said petition for rehearing, the decisions of the United States Circuit Court of Appeals (Second Circuit) in four cases which are pending on appeal in the United States Circuit Court of Appeals (Second Circuit), namely:

Commissioner of Internal Revenue,
Petitioner,
vs.
Richard Van Nest Gambrill,
Respondent,
No. 41

which involves the basis for determining gain or loss on securities sold by said respondent, as fixed by the third sentence of Section 113 (a) (5) of the Revenue Act of 1928, and

Commissioner of Internal Revenue,
Petitioner,
vs.
Marjorie K. Campbell,
Respondent,
No. 257

Commissioner of Internal Revenue,
Petitioner,
vs.
Seymour H. Knox,
Respondent,
No. 258

Commissioner of Internal Revenue,
Petitioner,
vs.
Dorothy K. G. Rogers,
Respondent,
No. 259,

which involve the basis for determining gain or loss on securities sold by said respondents, as fixed by the third sentence of Section 113 (a) (5) of the Revenue Act of 1932.

Affiant further says that said four appeals last above mentioned have been argued in and submitted to the United States Circuit Court of Appeals (Second Circuit)

and may be decided within the time requested herein for filing petition for rehearing.

Further affiant saith not.

Francis E. Baldwin.

Subscribed and sworn to before me this 8th day of March, A. D. 1940.

Samuel O. Pearce,
Notary Public.

(Seal)

Endorsed: Filed March 8, 1940. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the fifteenth day of March, 1940, the following further proceedings were had and entered of record, to-wit:

Friday, March 15, 1940.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.

Commissioner of Internal Revenue, *Petitioner,* *vs.* Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*	Petition for Review of Decision of the United States Board of Tax Appeals.

7049

On motion of counsel for respondents, it is ordered that the time for filing a petition for rehearing in this cause be, and it is hereby extended until the further order of this Court, said extension not to expire before April 5, 1940.

And afterwards, to-wit: On the third day of April, 1940, there was filed in the office of the Clerk of this Court, a motion for further extension of time within which to file a petition for rehearing, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Commissioner of Internal Revenue, *Petitioner,* *vs.* Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*	No. 7049.

MOTION.

Now come Jeremiah D. Maguire and Ruth S. Maguire, respondents in the above-entitled cause No. 7049, and all of the other respondents in the other above-entitled causes Nos. 7050, 7051, 7052, 7053, 7054, 7055 and 7056, by their attorneys, and respectfully represent:

(1) That on March 15, 1940, this Honorable Court entered an order extending the time for filing petition for rehearing in the above-entitled causes until the further order of this Court, said extension not to expire before April 5, 1940;

(2) That in the affidavit of the undersigned, attached to motion of Jeremiah D. Maguire and Ruth S. Maguire, respondents in cause No. 7049, filed in this Court on March 8, 1940, it was stated that there were pending in the United States Circuit Court of Appeals (Second Circuit) four cases, the titles and numbers of which were set forth in said affidavit; that one of said cases involved the basis for determining gain or loss on the sale of securities by the respondent in said case, as fixed by the third sentence of Section 113 (a) (5) of the Revenue Act of 1928; and that the other three of said cases involved the basis for determining gain or loss on the sale of securities by the respondents in said cases, respectively, as fixed by the third sentence of Section 113 (a) (5) of the Revenue Act of 1932. Said Section 113 (a) (5) of the Revenue Act of 1928 and Section 113 (a) (5) of the Revenue Act of 1932 are identical;

(3) That in said affidavit of the undersigned affiant stated that said motion for an extension of time within which to file petition for rehearing in the above entitled causes was made in order that there might be submitted to this Honorable Court, with said petition for rehearing, the decisions of the United States Circuit Court of Ap-

peals (Second Circuit) in said four cases, which cases had been argued and submitted to the United States Circuit Court of Appeals (Second Circuit) on February 15, 1940;

(4) That no decision in any of said four cases has been rendered by said United States Circuit Court of Appeals (Second Circuit).

Respondents herein pray this Honorable Court to grant a further extension of fifteen (15) days from April 5, 1940, within which to file petition for rehearing in the above entitled causes.

Respondents submit herewith, in support of this motion, the affidavit of Francis E. Baldwin.

A copy of this motion has been sent by registered mail, return receipt requested, to

Samuel O. Clark, Jr.,
Assistant Attorney General,
Sewall Key,
Arthur A. Armstrong,
Special Assistants to the Attorney General,
Counsel for Petitioner,

and request has been made that said attorneys consent to the granting of said extension.

Respectfully submitted,
Francis E. Baldwin,
Albert H. and Henry Veeder,
Attorneys for Respondents.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Commissioner of Internal Revenue, *Petitioner,* *vs.* Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*	No. 7049.

AFFIDAVIT.

State of Illinois, } ss.
County of Cook. }

Francis E. Baldwin, being first duly sworn, on his oath states that he is counsel herein for the above-named re-

spondents; that he has prepared and makes a motion for an extension of fifteen (15) days from April 5, 1940, within which to file petition for rehearing in the above entitled causes, in order that there may be submitted to this Honorable Court, with said petition for rehearing, the decisions of the United States Circuit Court of Appeals (Second Circuit) in four cases which are pending on appeal in the United States Circuit Court of Appeals (Second Circuit), namely:

Commissioner of Internal Revenue,
Petitioner,
vs.
Richard Van Nest Gambrill,
Respondent.
No. 41

Commissioner of Internal Revenue,
Petitioner,
vs.
Marjorie K. Campbell,
Respondent.
No. 257

Commissioner of Internal Revenue,
Petitioner,
vs.
Seymour H. Knox,
Respondent.
No. 258

Commissioner of Internal Revenue,
Petitioner,
vs.
Dorothy K. G. Rogers,
Respondent.
No. 259

Affiant further says that said four appeals last above mentioned have been argued in and submitted to the United States Circuit Court of Appeals (Second Circuit), but that no decision in any of said four cases has been rendered by said United States Circuit Court of Appeals (Second Circuit).

Further affiant saith not.

Francis E. Baldwin.

Subscribed and sworn to before me this 3rd day of April, A. D. 1940.

Albert L. Lettermann,
(Seal) *Notary Public.*

Endorsed: Filed April 3 1940. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the fourth day of April, 1940, the following further proceedings were had and entered of record, to-wit:

Thursday, April 4, 1940.

Court met pursuant to adjournment.

Before:

Hon. Otto Kerner, Circuit Judge.

Commissioner of Internal Revenue, *Petitioner,* vs. Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*	Petition for Review of Decision of the United States Board of Tax Appeals.

7049

On motion of counsel for respondents, it is now here ordered that the time for filing the petition for a rehearing be extended for a period of fifteen days from April 5, 1940.

And afterwards, to-wit: On the seventeenth day of April, 1940, there was filed in the office of the Clerk of this Court, a petition for rehearing, which said petition for rehearing is not copied here.

And afterwards, to-wit: On the twenty-first day of May, 1940, the following further proceedings were had and entered of record, to-wit:

Tuesday, May 21, 1940.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

Commissioner of Internal Revenue, *Petitioner,* *vs.* Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*	Petition for Review of Decision of the United States Board of Tax Appeals.

7049

It is ordered by the Court that the petition for a rehearing of this cause be, and it is hereby denied.

And afterwards, to-wit: On the tenth day of June, 1940, there was filed in the office of the Clerk of this Court, a motion to stay the mandate, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Commissioner of Internal Revenue, *Petitioner,* *vs.* Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*	No. 7049.

MOTION.

Now come Jeremiah D. Maguire and Ruth S. Maguire, respondents in the above entitled cause No. 7049, and all of the other respondents in the other above entitled causes

Nos. 7050, 7051, 7052, 7053, 7054, 7055 and 7056, by their attorneys, and shows the court:

(1) That this Honorable Court on March 5, 1940, rendered its decision in the above entitled cause of Commissioner of Internal Revenue, Petitioner, *vs.* Jeremiah D. Maguire and Ruth S. Maguire, Respondents; that on April 19, 1940, petition for rehearing was filed by said respondents; that on May 21, 1940, this Honorable Court denied said petition for rehearing;

(2) That by order entered by this Court and filed July 14, 1939, the Court ordered and directed that in each of the above entitled causes, other than that of Commissioner of Internal Revenue, Petitioner, *vs.* Jeremiah D. Maguire and Ruth S. Maguire, Respondents, No. 7049, the decision of this Court in said cause of Commissioner *vs.* Maguire should be considered and held to be controlling, and to be the decision of this Court in all of the other seven cases hereinabove entitled; and that upon the decision of this Court in the case of Commissioner *vs.* Maguire becoming final, like decisions be entered and orders for like mandates issue in the remaining cases captioned herein upon motion of either party hereto and service of such motion upon the other party;

(3) That said order further provided that in the event application shall be made by either party to the Supreme Court of the United States for a writ of certiorari in the said case of Guy T. Helvering, Commissioner of Internal Revenue, Petitioner on Review, *vs.* Jeremiah D. Maguire and Ruth S. Maguire, Respondents on Review, then, pending final disposal of said case by the Supreme Court, no order for mandate or mandate shall issue in any of the other seven cases, and upon final disposition of said case by the Supreme Court, an order for mandate and mandate similar to those which may be made and issued by this Court in the said Maguire case shall be made and issued by the Court in each of the said other cases.

Respondents intend to file in the Supreme Court of the United States a petition for a writ of certiorari to review the decision of this Court in the above entitled case of Commissioner of Internal Revenue, Petitioner, *vs.* Jeremiah D. Maguire and Ruth S. Maguire, Respondents, and for that reason said respondents hereby pray that the execution and enforcement of the judgment of this Honorable Court entered herein may be stayed for a reasonable

time to enable the respondents to apply for and to obtain a writ of certiorari from the Supreme Court of the United States.

Respectfully submitted,
Francis E. Baldwin,
Albert H. & Henry Veeder,
Attorneys for Respondents.

State of Illinois, }
County of Cook. } ss.

Francis E. Baldwin, being first duly sworn, on his oath states that he is one of counsel for the above-named respondents; that he has caused a copy of this Motion for Stay of Mandate in the above entitled cause to be sent by registered mail, return receipt requested, to

Samuel O. Clark, Jr.,
Assistant Attorney General,
Sewall Key,
Arthur A. Armstrong,
Special Assistants to the Attorney General,
Washington, D. C.,
Counsel for Petitioner.

Francis E. Baldwin.

Subscribed and sworn to before me this 19th day of June, A. D. 1940.

Robert E. Fisher,
Notary Public.

(Seal)
FEB:C

Endorsed: Filed June 10, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the eleventh day of June, 1940, the following further proceedings were had and entered of record, to-wit:

Tuesday, June 11, 1940.

Court met pursuant to adjournment.

Before:

Hon. Otto Kerner, Circuit Judge.

Commissioner of Internal Revenue, *Petitioner,* vs. Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*	Petition for Review of Decision of the United States Board of Tax Appeals.

7049

On motion of counsel for respondents, it is ordered that the mandate of this Court in this cause be, and it is hereby, stayed pursuant to Rule 25 of the rules of this Court.

And afterwards, to-wit: On the twelfth day of June, 1940, there was filed in the office of the Clerk of this Court, a motion for permission to file petition for reconsideration of respondents' petition for rehearing etc., which said motion is in the words and figures following, to-wit:

No. 7049.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Commissioner of Internal Revenue,
Petitioner,
vs.
Jeremiah D. Maguire and Ruth S. Maguire,
Respondents.

Petition for Review of Decision of the United States Board of Tax Appeals.

MOTION FOR PERMISSION TO FILE PETITION FOR RECONSIDERATION BY THIS COURT OF RESPONDENTS' PETITION FOR REHEARING AND FOR LEAVE TO MAKE ORAL ARGUMENT THEREON.

Now come Francis E. Baldwin and Albert H. & Henry Veeder, attorneys for respondents, and respectfully petition this Court that leave be granted to respondents to file petition for reconsideration by this Court of Respondents' Petition for Rehearing, which was denied by this Court by order entered in this cause on May 21, 1940.

In support of this motion, the attention of this Court is respectfully directed to the decision in favor of the taxpayers rendered by the United States Circuit Court of Appeals for the Second Circuit on June 10, 1940, in the following cases:

Commissioner of Internal Revenue,
Petitioner,
vs.
Richard Van Nest Gambrill,
Respondent.
No. 41.

Commissioner of Internal Revenue,
Petitioner,
vs.
Marjorie K. Campbell,
Respondent.
No. 257.

Commissioner of Internal Revenue,
Petitioner,
vs.
Seymour H. Knox,
Respondent.
No. 258.

Commissioner of Internal Revenue,
Petitioner,
vs.
Dorothy K. G. Rogers,
Respondent.
No. 259.

in each of which cases the principal question for decision was identical with the question for decision by this Honorable Court in the above-entitled case of Commissioner of Internal Revenue, Petitioner, *vs.* Jeremiah D. Maguire and Ruth S. Maguire, Respondents, namely, the basis to be used in determining gain or loss, under Section 113 (a) (5) of the Revenue Act of 1928 and Section 113 (a) (5) of the Revenue Act of 1932 (which sections were identical), resulting from the sale by remainderman of securities passing by general bequest through a testamentary trust, some of which securities were owned by the testator at the time of his death, some were purchased by the executor after the testator's death before setting up the trust, and some were purchased by the trustee after the trust was established. The Circuit Court of Appeals (Second Circuit) in each of said cases held that under section 113 (a) (5) of the 1928 and 1932 Revenue Acts, the basis for determining gain or loss from the sale of such securities, which were delivered to the taxpayer by the trustee after

the right to possession became fixed by termination of the prior beneficial estate, was the fair market value of the property at the time of the delivery to the taxpayer. A copy of said decision of the United States Circuit Court of Appeals (Second Circuit) is hereto attached and made a part hereof.

Respondents respectfully pray that this motion be granted and that, upon reconsideration by this Honorable Court of Respondents' Petition for Rehearing, oral argument thereon be permitted.

Respectfully,
Francis E. Baldwin,
Albert H. & Henry Veeder,
Attorneys for Respondents.

State of Illinois, }
County of Cook. } ss.

Francis E. Baldwin, being first duly sworn, on his oath states that he is one of counsel for the above-named respondents; that he has caused a copy of this Motion for Permission to File Petition for Reconsideration by this Court of Respondents' Petition for Rehearing and for Leave to Make Oral Argument thereon in the above-entitled cause to be sent by registered mail, return receipt requested, to

Samuel O. Clark, Jr.,
Assistant Attorney General,
Sewall Key,
Arthur A. Armstrong,
Special Assistants to the Attorney General,
Washington, D. C.,
Counsel for Petitioner.

Francis E. Baldwin.

Subscribed and sworn to before me this 12th day of June, A. D. 1940.

Robert E. Fisher,
Notary Public.

(Seal)

FEB:C

Endorsed: Filed June 12, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the ninth day of July, 1940, there was filed in the office of the Clerk of this Court, a motion for further stay of mandate, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Commissioner of Internal Revenue,
Petitioner,
vs.
Jeremiah D. Maguire and Ruth S. Maguire,
Respondents.
No. 7049.

MOTION.

Now come Jeremiah D. Maguire and Ruth S. Maguire, respondents in the above-entitled cause No. 7049, and all of the other respondents in the other above-entitled causes, Nos. 7050, 7051, 7052, 7053, 7054, 7055 and 7056, by their attorneys, and respectfully represent:

(1) That on June 11, 1940, this Honorable Court, upon motion of Jeremiah D. Maguire and Ruth S. Maguire, respondents in the above-entitled cause No. 7049, and all of the other respondents in the other above-entitled causes, Nos. 7050 to 7056, both inclusive, entered its order staying mandate of this Court, pursuant to Rule 25 of this Court, to July 11, 1940;

(2) That on June 12, 1940, said Jeremiah D. Maguire and Ruth S. Maguire filed in this Court their motion for permission to file petition for reconsideration by this Court of Respondents' Petition for Rehearing and for leave to make oral argument thereon, and that no order upon said petition has been entered by this Court.

Respondents hereby pray that the execution and enforcement of the judgment of this Honorable Court entered herein may be stayed for a further period of not less than thirty (30) days from the date hereof.

Dated at Chicago, Illinois, this 9th day of July, 1940.

Francis E. Baldwin,
Albert H. & Henry Veeder,
Attorneys for Respondents.

State of Illinois, }
County of Cook. } ss.

Francis E. Baldwin, being first duly sworn, on his oath states that he is one of counsel for the above-named respondents; that he has caused a copy of this Motion for further stay of mandate in the above-entitled cause to be sent by registered mail, return receipt requested, to

Samuel O. Clark, Jr.,
Assistant Attorney General,
Sewall Key,
Arthur A. Armstrong,
Special Assistants to the Attorney General,
Washington, D. C.,
Counsel for the Commissioner of Internal Revenue.

Francis E. Baldwin.

Subscribed and sworn to before me this 9th day of July, A. D. 1940.

William B. Elson, Jr.,
Notary Public.

(Seal)
FEB:C

Endorsed: Filed July 9, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the tenth day of July, 1940, the following further proceedings were had and entered of record, to-wit:

Wednesday, July 10, 1940.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

Commissioner of Internal Revenue,
Petitioner,
vs.
7049
Jeremiah D. Maguire and Ruth S. Maguire,
Respondents.

Petition for Review of Decision of the United States Board of Tax Appeals.

It is ordered by the Court, that the motion of counsel for respondents for permission to file a petition for reconsideration by this Court of respondents' petition for rehearing, be, and the same is hereby denied.

And on the same day, to-wit: On the tenth day of July, 1940, the following further proceedings were had and entered of record, to-wit:

Wednesday, July 10, 1940.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

Commissioner of Internal Revenue,
Petitioner,
vs.
7049
Jeremiah D. Maguire and Ruth S. Maguire,
Respondents.

Petition for Review of Decision of the United States Board of Tax Appeals.

On motion of counsel for respondents, it is ordered by the Court that the issuance of the mandate in this cause be stayed an additional thirty days.

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UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 61 to 93, inclusive, contain a true copy of proceedings had and papers filed (excepting motion for leave to file brief of Amicus Curiae in answer to petition for rehearing and order thereon) in the following entitled cause:

Cause No. 7049.

Commissioner of Internal Revenue,
Petitioner,

vs.

Jeremiah D. Maguire and Ruth S. Maguire,
Respondents,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of August, A. D. 1940.

Kenneth J. Carrick,

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

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SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILE COPY

Office - Supreme Court, U. S.
FILED
AUG 29 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 346

JEREMIAH D. MAGUIRE AND RUTH S. MAGUIRE,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

ALBERT H. VEEDER,
FRANCIS E. BALDWIN,
33 South Clark Street,
Chicago, Illinois.
Attorneys for Petitioners.

THE BUNTHORP-BARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. .....

JEREMIAH D. MAGUIRE AND RUTH S. MAGUIRE,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Jeremiah D. Maguire and Ruth S. Maguire, submit this petition for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit, rendered March 5, 1940 (111 F. (2d) 843). A petition for rehearing herein was denied by the Court of Appeals on May 21, 1940 (R. 84). There are filed herewith a certified copy of the entire transcript of record in said cause and a brief in support of this petition.

Summary Statement of the Matter Involved.

The facts herein are not in dispute and have been stipulated (R. 14-30). They may be summarized as follows:

Gustavus F. Swift died on March 29, 1903, leaving nine children surviving him, one of whom died in 1911. Ann M. Swift, the widow of Gustavus F. Swift, died on May 19, 1922 (R. 32). Ruth Swift Maguire (hereinafter called the taxpayer) is one of the eight children of Gustavus F. Swift who were surviving on March 1, 1913, and also on March 29, 1923 (R. 15, 16).

Gustavus F. Swift, by his last will and testament, after devising and bequeathing to his widow certain real estate on which the family residence stood, together with all household furniture and other property used in connection with said residence, devised and bequeathed, generally and not specifically, to Louis F. Swift, Edward F. Swift and Edward Tilden, as executors and trustees, the residue of his estate. The will directed the executors and trustees to pay all debts, to make certain payments annually commencing with the date of the testator's decease and continuing until the final distribution of the estate, and, after payment of all debts of decedent, to make certain partial distributions to members of decedent's family and other relatives. By clause 8 of said will, said executors and trustees were further directed:

> "to make a final distribution of all the rest and residue of my estate among my wife and children, at any time in their judgment and discretion after the expiration of ten (10) years from and after the date of my decease, but not before, and in any event, not later than twenty (20) years thereafter, giving to my wife the one-third part thereof, the balance to be divided among my children, share and share alike, and should my wife not be living at the time of such distribution, then the same shall be divided equally among my children, share and share alike, the descendants of any deceased children in such distribution

to take the proportion of their deceased parent'' (R. 25, 26).

On December 11, 1905, the Probate Court of Cook County, Illinois, entered an order approving the final account of the executors of the Estate of Gustavus F. Swift, and directing that the executors turn over to themselves, as trustees, the remainder of the estate in their hands, which they did on that date (R. 16). On March 29, 1923, the personal property thus received by the testamentary trustees from the executors of the Estate of Gustavus F. Swift, together with other personal property purchased subsequently by the testamentary trustees, was distributed by them in kind to the eight children of said Gustavus F. Swift who were then surviving, including the taxpayer (R. 34, 35). This personal property consisted of shares of the capital stock of certain corporations and bills and accounts receivable. By agreement between the taxpayer and her co-beneficiaries, the testamentary trustees under the will of Gustavus F. Swift delivered all of said property to the trustees of two *inter vivos* trusts, Union Terminal Trust and Swift Family Realty Trust, which the taxpayer and her co-beneficiaries had created for the purpose of selling said properties and distributing the proceeds thereof to the taxpayer and her co-beneficiaries under the will of Gustavus F. Swift. The property was sold by the two trusts in 1929 and 1930 (R. 34, 35).

On March 13, 1933, the Commissioner of Internal Revenue asserted a deficiency in income tax of Petitioners for the calendar year 1930 in the amount of $71,429.62 (R. 8). In determining the amount of the deficiency, the Commissioner used, as the bases for computing gain on the sale of the personal property distributed by the testamentary trustees to the taxpayer as a residuary legatee under the will of her father, Gustavus F. Swift, (1) the

fair market value on December 11, 1905, or the March 1, 1913, value, whichever was greater, of such property as was received by the testamentary trustees from the executors of Gustavus F. Swift and (2) the cost of personal property purchased by the testamentary trustees and by them distributed to the taxpayer and her co-beneficiaries on March 29, 1923 (except that the March 1, 1913, value of property purchased before that date was said to control if it exceeded cost).

The Commissioner at the same time asserted a deficiency in income tax for the calendar year 1930, calculated upon the same bases, against each of the other seven surviving beneficiaries of the testamentary trust created by the will of Gustavus F. Swift. Petitioners and the seven other beneficiaries contested the asserted deficiencies before the United States Board of Tax Appeals, claiming that there had been no distribution to them under Section 113 (a)(5) of the 1928 Revenue Act until March 29, 1923, when they received the property here involved from the testamentary trustees (R. 14, 15).

On January 28, 1939, the Board of Tax Appeals rendered its memorandum findings of fact and opinion in the cases before it, known as *Jeremiah D. Maguire and Ruth S. Maguire, Petitioners* v. *Commissioner of Internal Revenue, Respondent*, B. T. A. Docket No. 72216, and of *Harold H. Swift, Gustavus F. Swift, Charles H. Swift, Charles H. Swift, et al., Executors, Estate of Edward F. Swift, Deceased, Louis F. Swift, Jr., et al., Executors, Estate of Louis F. Swift, Deceased, Helen Swift Neilson*, and *George H. Swift, Petitioners* v. *Commissioner of Internal Revenue, Respondent*, B. T. A. Docket Nos. 90338 to 90344, both inclusive. On March 29, 1939, the Board of Tax Appeals made its decision in Petitioners' case, B. T. A. Docket No. 72216, holding that there was a deficiency in income tax of Petitioners for the calendar year 1930 in

the amount of $46,433.60, which is admitted by Petitioners to be correct (R. 31-47). A copy of the opinion of the Board of Tax Appeals is appended to the brief filed herewith.

In deciding this case, and related cases, the Board of Tax Appeals found that

> "the language of the statute above quoted, however, is clear and unambiguous. The basis laid down by the statute is 'the fair market value of the property at the time of the distribution to the taxpayer.' * * * The testamentary trust was not the taxpayer. The taxpayers are the petitioners herein, or their decedents, to whom the assets were distributed by the testamentary trustees on March 29, 1923 * * *."
>
> "Upon authority of the cited cases we hold that the time of the distribution to the taxpayers of the property which they acquired from the residuary trust estate created by the will of their father was the time at which it was distributed to them by the testamentary trustees upon termination of the trust estate on March 29, 1923" (R. 38, 39).

On June 21, 1939, Guy T. Helvering, Commissioner of Internal Revenue, Respondent, in B. T. A. Docket No. 72216, filed in the United States Circuit Court of Appeals for the Seventh Circuit under its No. 7049 his petition for review and assignments of error (R. 48-53). On July 7, 1939, the Court of Appeals, upon the joint motion of the Commissioner of Internal Revenue and the Respondents in each of the eight cases entered an order herein providing as follows:

> "5. In the event that application shall be made by either party to the Supreme Court of the United States for a writ of certiorari in the said case of *Guy T. Helvering, Commissioner of Internal Revenue, Petitioner on Review* v. *Jeremiah D. Maguire and Ruth S. Maguire, Respondents on Review,* then pending final disposal of said case by the Supreme Court no Order for Mandate or Mandate shall issue in any of the other seven cases, and upon final disposition of said case by the Supreme Court, an Order for Man-

date and Mandate similar to those which may be made and issued by this Court in the said Maguire case shall be made and issued by the Court in each of the said other cases" (R. 55, 56).

The principal issue in the Court of Appeals was the construction to be placed upon the words "at the time of the distribution to the taxpayer", as those words are used in the third sentence of § 113 (a) (5) of the Revenue Act of 1928, in determining the proper basis for computing the gain to Petitioners from the sale of the personal property delivered to them on March 29, 1923 by the testamentary trustee and sold by the trustees of Union Terminal Trust in the calendar year 1930, and by the trustees of Swift Family Realty Trust in the calendar year 1929. Sixty per cent of the gain from the sale made in 1929 by the Swift Family Realty Trust is taxable in the calendar year 1930. Income taxes for the calendar year 1929 are not in dispute. Petitioners and Respondent have stipulated that the beneficiaries of the testamentary trust, Ruth Swift Maguire, Harold H. Swift, Gustavus F. Swift, Charles H. Swift, Edward F. Swift, Louis F. Swift, Helen Swift Neilson, and George H. Swift, are taxable as though the sales made were made by said beneficiaries individually (R. 19, 20, 21).

Petitioners and Respondent have stipulated the amount of taxable gain if the proper basis of all such personal property so sold is the fair market value thereof on March 29, 1923, when the property was delivered by the testamentary trustees to the beneficiaries of the trust, which Petitioners contend was "the time of the distribution to the taxpayer". They have also stipulated the amount of taxable gain if the proper bases were (1) as to property received by the testamentary trustees from the executors of Gustavus F. Swift, the fair market value thereof on December 11, 1905, or on March 1, 1913 whichever was greater; and (2) as to property purchased by the testamentary trustees, the cost thereof to them (except that

the March 1, 1913, value of property purchased before that date should control if it exceeded cost) (R. 19, 20, 21).

The decision of the Court of Appeals herein sustained the contentions of the Commissioner of Internal Revenue as to the bases for computing gain on the sale of the personal property involved herein, reversed the order of the Board of Tax Appeals, and remanded the cause for further proceedings not inconsistent with the views expressed in the opinion of the Court of Appeals (R. 68-75).

The Court of Appeals held that the phrase "time of distribution to the taxpayer", as used in § 113 (a) (5) of the 1928 Act means "time of distribution by the decedent's estate, and it follows consequently that the time of such distribution in the instant case was December 11, 1905. Moreover, the basis of the property coming to the taxpayer from the executors, through the testamentary trustees, is the 1905 value or the 1913 value of such property, whichever was greater. § 113 (b)" (R. 73).

As to property purchased by the testamentary trustees and distributed to the taxpayers on March 29, 1923, the court concluded that such property was not property transmitted at death, that it was acquired by the taxpayer by purchase and not by will, and that as to it, the taxpayer's basis was the cost to the testamentary trustees or the March 1, 1913 value, whichever was greater (R. 74, 70). A copy of the opinion and decision of the Circuit Court of Appeals (Seventh Circuit) is appended to the brief filed herewith.

Petitioners have contended and now contend that the words "the time of the distribution to the taxpayer", as used in § 113 (a) (5) of the Revenue Act of 1928 (C. 852, 45 Stat. 818), as applied to the issues herein, mean the distribution on March 29, 1923, by the testamentary trustees to the taxpayer.

Respondent has contended that as to such personal property as was owned by the testator, Gustavus F. Swift,

at the time of his death in 1903, and which was sold by the taxpayer, the words "the time of the distribution to the taxpayer" mean the distribution on December 11, 1905, by the Executors of the Estate of Gustavus F. Swift, Deceased, to themselves as testamentary trustees and that as to such property the basis for determining taxpayer's gain from the sale thereof was its fair market value on that date or its March 1, 1913 value, whichever was greater. Respondent also contends that such personal property as was purchased by the testamentary trustees subsequent to December 11, 1905, and by them distributed on March 29, 1923, to the eight children of Gustavus F. Swift then surviving, including the taxpayer, was not "property transmitted at death", and that, therefore, the proper basis for determining taxpayer's gain from the sale thereof was its cost to such testamentary trustees, or its March 1, 1913, value if that value exceeded cost.

Statement of the Basis Upon Which It Is Contended That This Court Has Jurisdiction to Review the Judgment in Question.

This Court's jurisdiction to issue the writ of certiorari herein prayed for is established by Section 240 of the Judicial Code, as amended (U. S. C. A. Title 28, Sec. 347), which reads in part as follows:

> "(a) In any case, civil or criminal, in a circuit court of appeals or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

After providing for review in certain cases by writ of

error or appeal, the same section of the statute further provides:

> "No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this Section."

Section 8 of the Act of February 13, 1925 (U. S. C. A. Title 28, Sec. 350), provides in part as follows:

> "No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *."

The order denying petition for rehearing filed by Petitioners in the Court of Appeals, and the judgment herein, were entered on May 21, 1940 (R. 84), and this petition is filed within three months thereafter.

The Questions Presented.

The questions presented for decision in the case may be stated as follows:

Did the Court of Appeals err in holding:

(1) "that the phrase 'time of distribution to the taxpayer' as used in § 113 (a) (5) of the 1928 Act means time of distribution by the decedent's estate, and it follows consequently that the time of such distribution in the instant case was December 11, 1905. Moreover, the basis of the property coming to the taxpayer from the executors, through the testamentary trustees, is the 1905 value or the 1913 value of such property, whichever was greater. § 113 (b)"; (R. 73) and

(2) "that property purchased by the trustees is not 'property transmitted at death' * * * it was acquired by purchase and not 'by will'" (R. 74). "As to property purchased between 1905 and 1913, § 113 (b) applies: the basis is cost or 1913 value, whichever greater. As to property purchased between 1913 and 1923, § 113 (a) applies: the basis is cost. As to these properties, each is acquired by the taxpayer in the year the trustees purchased it, and the cost in each instance is the cost to the trustees in the year of purchase" (R. 70).

Reasons Relied Upon for the Allowance of a Writ.

The general reasons relied upon for the allowance of the writ herein are:

1. The decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with the decisions of the Circuit Courts of Appeal for the First and Second Circuits in the cases of *Commissioner of Internal Revenue* v. *Libbey,* 100 F. (2) 458 (C. C. A. 1st); *Commissioner of Internal Revenue* v. *Richard Van Nest Gambrill,* 112 F. (2) 530 (C. C. A. 2nd); *Commissioner of Internal Revenue* v. *Marjorie K. Campbell,* 112 F. (2) 530 (C. C. A. 2nd); *Commissioner of Internal Revenue* v. *Seymour H. Knox,* 112 F. (2) 530 (C. C. A. 2nd); *Commissioner of Internal Revenue* v. *Dorothy K. Rogers,* 112 F. (2) 530 (C. C. A. 2nd).

2. The Circuit Court of Appeals for the Seventh Circuit in the instant case has decided an important question of Federal law, which has not been, but should be, settled by this Court.

3. The Circuit Court of Appeals for the Seventh Circuit in the instant case has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

WHEREFORE, Petitioners pray that this petition for a writ of Certiorari, directed to the United States Circuit Court of Appeals for the Seventh Circuit, may be granted and that this Court proceed as is provided by law and the rules of this Court in such cases, and that, upon final hearing, the judgment of the Circuit Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

ALBERT H. VEEDER,
FRANCIS E. BALDWIN,
33 South Clark Street,
Chicago, Illinois
Attorneys for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No.

JEREMIAH D. MAGUIRE AND RUTH S. MAGUIRE,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARTHUR H. VENNER,
FRANCIS E. BAKEWELL,
33 South Clark Street,
Chicago, Illinois,
Attorneys for Petitioners.

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JEREMIAH D. MAGUIRE AND RUTH S. MAGUIRE,
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Respondent.

BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

GENERAL STATEMENT.

The Petitioners herein apply for review of the decision of the United States Circuit Court of Appeals, Seventh Circuit, reported at 111 F. (2d) 843.

The grounds upon which the jurisdiction of this court is invoked are stated in the attached petition for a writ of certiorari.

The facts involved are set forth in the attached petition for certiorari under the heading "Summary Statement of the Matter Involved."

The principal contested issue is the construction to be given to the term "the time of the distribution to the taxpayer" as used in the third sentence of § 113 (a) (5) of the

Revenue Act of 1928, Chapter 852, 45 Stat. 791, 818, in determining the proper basis for computing the gain from the sale of personal property acquired by general bequest under the will of taxpayer's father, Gustavus F. Swift.

Petitioners have contended and here contend that the term "at the time of the distribution to the taxpayer" refers to the time of delivery of such property to the taxpayer, Ruth Swift Maguire, by the testamentary trustees under her father's will on March 29, 1923.

Respondent has contended that (1) as to such of said property distributed by the executors of the will of Gustavus F. Swift, deceased, to themselves as testamentary trustees on December 11, 1905, and by them delivered to the taxpayer, Ruth Swift Maguire, on March 29, 1923, the proper basis was the fair market value of such property on December 11, 1905, or on March 1, 1913, whichever was greater; and (2) that as to such of said property as was purchased by the testamentary trustees subsequent to December 11, 1905, and distributed to the taxpayer on March 29, 1923, the taxpayer's proper basis was the cost to the testamentary trustees or its March 1, 1913, value, if it exceeded the cost.

STATUTE.

Section 113 (a) (5), Section 113 (b) (1) and (2), and Section 701 (a) (1) * * * (13) of the Revenue Act of 1928 contain the applicable provisions of the statute. (Appendix, *infra.*)

ERRORS ASSIGNED.

THE ERRORS ASSIGNED AND URGED ARE:

(1) The decision of the Court of Appeals is erroneous in holding that the phrase "at the time of the distribution to the taxpayer" as used in § 113 (a) (5) of the Revenue Act of 1928 means time of distribution by the executors of the decedent's estate to themselves as testamentary trustees, on December 11, 1905, and that "the basis of the property coming to the taxpayer from the executors, through the testamentary trustees, is the 1905 value or the 1913 value of such property, whichever was greater."

(2) The decision of the Court of Appeals is erroneous in holding that property purchased by testamentary trustees and by them distributed to the taxpayer, is property acquired by the taxpayer "by purchase" and not "by will", that such property was acquired by the taxpayer in the year the trustees purchased it, and that taxpayer's basis therefor is the cost to the trustees, or the value thereof on March 1, 1913, whichever is greater.

(3) Said decision is in conflict with decisions of United States Circuit Courts of Appeal for the First and Second Circuits, in the cases cited on page 10 of the Petition for Certiorari herein.

(4) Said decision is upon an important question of Federal law, which has not been, but should be, settled by this Court.

(5) Said decision is probably in conflict with applicable decisions of this Court.

SUMMARY OF ARGUMENT.

I.

The decision of the Court below is in conflict with decisions of the United States Circuit Courts of Appeal for the First and Second Circuits.

II.

The Court below erred in construing the applicable statute because the Court failed to recognize that the controlling words in the phrase "at the time of the distribution to the taxpayer" are the words "to the taxpayer."

III.

The words "distribution to the taxpayer," as used in the third sentence of § 113 (a) (5) of the Revenue Act of 1928 mean "delivery to the taxpayer."

IV.

The statute is clear and is not ambiguous.

V.

The legislative history relating to the enactment of § 113 of the Revenue Act of 1928 supports the position of the taxpayer.

VI.

The Court erred in concluding that "property purchased by the trustees and distributed to the taxpayer" was not "acquired by will."

ARGUMENT.

I.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH DECISIONS OF THE UNITED STATES CIRCUIT COURTS OF APPEAL FOR THE FIRST AND SECOND CIRCUITS.

The specific questions here involved have been decided contrary to and in conflict with the decision of the Court below by the First Circuit Court of Appeals in *Commissioner of Internal Revenue* v. *Libbey*, 100 F. (2d) 458, and by the Second Circuit Court of Appeals in *Commissioner of Internal Revenue* v. *Richard Van Nest Gambrill*, 112 F. (2d) 530; *Commissioner of Internal Revenue* v. *Marjorie K. Campbell*, 112 F. (2d) 530; *Commissioner of Internal Revenue* v. *Seymour H. Knox*, 112 F. (2d) 530; and *Commissioner of Internal Revenue* v. *Dorothy K. Rogers*, 112 F. (2d) 530.

The *Gambrill* case, *supra*, involved the question of the basis for determining gain or loss under § 113 (a) (5) of the Revenue Act of 1928. The *Libbey, Campbell, Knox* and *Rogers* cases involved the question of the basis of determining gain or loss under § 113 (a) (5) of the Revenue Act of 1932, which was identical with § 113 (a) (5) of the Revenue Act of 1928. In each of these cases, the property sold was personal property received by general bequest from testamentary trustees, and in each case the Circuit Court of Appeals which rendered the decision held, in well reasoned opinions, that the term "at the time of the distribution to the taxpayer" as used in § 113 (a) (5) of the applicable Act refers to the time of delivery of such property to the taxpayer.

The decision of the Court below conflicts in principle

with that of the First Circuit Court of Appeals in *United States* v. *Van Nostrand*, 94 F. (2d) 510 (cited in the *Libbey* case, *supra*), with that of the Third Circuit Court of Appeals in *Haskell* v. *Commissioner*, 78 F. (2d) 869, and with that of the Sixth Circuit Court of Appeals in *Williamson* v. *Commissioner*, 100 F. (2d) 735, and *Taft, Trustee*, v. *Commissioner*, 101 F. (2d) 1007.

The Van Nostrand case decided that the term "distribution" as used in § 113 (a) (5) of the Revenue Act of 1928 refers to actual delivery to the taxpayer. The Haskell case involved the question of the determination, under § 113 (a) (5) of the Revenue Act of 1928, of the amount of loss sustained by the taxpayer from the sale in 1930 of shares of stock acquired, as a legatee under a will, by general bequest. The *Williamson* case involved the determination, under § 113 (a) (5) of the Revenue Act of 1932, of the amount of gain from the sale in 1932 and 1933 of certain stocks which taxpayer had acquired from the estate of her husband, who died intestate. The *Taft* case involved the determination, under § 113 (a) (5) of the Revenue Act of 1928, of the amount of loss sustained from the sale in 1930 of securities by a testamentary trustee to whom the residue of an estate was bequeathed. In all these decisions, the Courts held that the term "distribution to the taxpayer" meant "delivery to the taxpayer."

II.

THE COURT BELOW ERRED IN CONSTRUING THE APPLICABLE STATUTE BECAUSE THE COURT FAILED TO RECOGNIZE THAT THE CONTROLLING WORDS IN THE PHRASE "AT THE TIME OF THE DISTRIBUTION TO THE TAXPAYER" ARE THE WORDS "TO THE TAXPAYER".

The conclusion of the Court below that Congress was not looking beyond the "distribution by the estate" of Gustavus F. Swift, the taxpayer's father (R. 71), and "did not intend the valuation date to go beyond the time when the

estate was closed" (R. 73), ignores the controlling words of the statute "at the time of the distribution to the taxpayer" as used in the third sentence of § 113 (a) (5) of the Revenue Act of 1928.

The meaning of the words "at the time" need not be defined. The words "to the taxpayer" are clear, definite, certain and unambiguous. The property involved was personal property which the taxpayer acquired by general bequest under the will of her father, Gustavus F. Swift.

In applying the statute, the first fact to be determined is the identity of the "taxpayer." The statute (§ 701 (a) (13) of the 1928 Act) provides that:

> "The taxpayer is any 'person' subject to a tax imposed by this Act,"

whether that "person" be an individual, a trust, an estate, a partnership or a corporation.

Ruth Swift Maguire is the "person" in this case who is "subject to a tax imposed by this Act." She is the person "ultimately liable for the tax itself". *Colorado National Bank of Denver* v. *Bedford*, No. 719, decided April 22, 1940. The taxpayer's identity having been established, the plain language of the act eliminates from consideration any "time" except the "time" when the property was distributed to the taxpayer.

Haskell v. *Commissioner*, 78 F. (2d) 869, 870 (C. C. A. 3rd) (cert. den. 296 U. S. 652).

United States v. *Van Nostrand*, 94 F. (2d) 510, 512 (C. C. A. 1st).

Commissioner v. *Libbey*, 100 F. (2d) 458, 460, 461 (C. C. A. 1st).

Williamson v. *Commissioner*, 100 F. (2d) 735 (C. C. A. 6th) (cert. den. 307 U. S. 623).

Taft, Trustee, v. *Commissioner*, 101 F. (2d) 1007 (C. C. A. 6th).

Commissioner v. *Gambrill and Three Other Cases*, 112 F. (2d) 530 (C. C. A. 2nd).

III.

THE WORDS "DISTRIBUTION TO THE TAXPAYER" AS USED IN THE THIRD SENTENCE OF § 113 (a) (5) OF THE REVENUE ACT OF 1928 MEAN "DELIVERY TO THE TAXPAYER."

The word "distribution" was defined in *Willcuts* v. *Ordway* (C. C. A. 8th), 19 F. (2d) 917, 918, as

> "separation and segregation from the trust estate so that it no longer forms any part or parcel thereof."

The United States Supreme Court, in speaking of the meaning of the word "distribution," as applied to dividends, held that the "date of payment, not the date of the declaration of the dividend, is the date of distribution." *Mason* v. *Routzahn*, 275 U. S. 175. To the same effect is *Lewellyn* v. *Harbison*, 31 F. (2d) 740 (cert. den. 280 U. S. 560), in which the Circuit Court of Appeals (3rd Circuit) held:

> "A distribution made is a completed act. * * * We agree with the Circuit Court of Appeals for the Sixth Circuit that a 'distribution made' means 'dividends paid' and not merely declared."

In every instance where the word "distribute" or the word "distribution" was used in the Revenue Act of 1928, it had reference to actual payment or delivery. (See Sections 112, 113 (a) (9), 115, 161, 162, 165, 167 and 182 of the Revenue Act of 1928.)

The word "distribution" was likewise used in the sense of actual payment or delivery in the Revenue Acts of 1926, 1924, 1921, and 1918.

It clearly appears from the decision of the United States Supreme Court in *Brewster* v. *Gage*, 280 U. S. 327, that the word "distribution," as used in § 113 (a) (5) of the Revenue Act of 1928, means delivery to the taxpayer of personal property acquired by intestacy or by general bequest. In its opinion the Court referred to the right of a legatee of such property "to have it delivered upon

entry of the decree of distribution * * *. The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs or legatees, and requires the administrators or executors to deliver it to them."

That the word "distribution," as used in the third sentence of Sec. 113 (a) (5) of the Revenue Act of 1928, means actual distribution to the taxpayer of property of the character described in said sentence also clearly appears from the decision of the Supreme Court in *McFeely* v. *Commissioner of Internal Revenue*, 296 U. S. 102 (with which five other cases[1] were decided).

The Commissioner contended in the *McFeely* case (and in each of the five other cases decided with it) that the words "the time of the distribution to the taxpayer," as used in Sec. 113 (a) (5) of the Revenue Act of 1928, meant the time of actual distribution to the taxpayer, and that until the date of such actual distribution, property could not be said to be held by the taxpayer under Sec. 101 of the Revenue Act of 1928. It was not disputed in the *McFeely* case that the words "at the time of the distribution to the taxpayer," as used in the third sentence of Sec. 113 (a) (5) of the 1928 Revenue Act, meant the date of actual distribution to the taxpayer.[2]

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1. *First Nat. Bank of Boston, et al., Trustees under Will of Blodgett* v. *United States*, 76 F. (2d) 200 (C. C. A. 1st).
Lee v. *Commissioner of Internal Revenue*, 76 F. (2d) 203 (C. C. A. 1st).
Dibblee v. *Commissioner of Internal Revenue*, 75 F. (2d) 617 (C. C. A. 9th).
Rand v. *Helvering, Commissioner of Internal Revenue*, 79 F. (2d) 24 (C. C. A. 8th).
Ogle v. *Helvering, Commissioner of Internal Revenue*, 77 F. (2d) 338 (C. C. A. 2nd).

2. In deciding the McFeely case the Supreme Court said:
"Here the rule obtains that a taxing statute, if of doubtful intent, should be construed favorably to the taxpayer. (Citing *Crooks* v. *Harrelson*, 282 U. S. 55, 61.)
"To depart from the literal meaning of § 101 (c) (8) would be to penalize the taxpayer by lengthening the period during which the capital asset must be held in what is really a single ownership to obtain the advantage of the reduced tax. Under these circumstances we ought not to depart from the plain meaning of the section in an effort to bring about a uniformity which it is claimed Congress intended but failed to express."

If, as held by the Court below, there was a distribution to the taxpayer, within the meaning of Sec. 113 (a) (5) of the Revenue Act of 1928, when the Swift estate was closed in the Probate Court on December 11, 1905, then, during the period from January 1, 1916, to March 29, 1923, Ruth Swift Maguire was the taxpayer liable for the tax on *all* income derived from the property held in trust for her under the will of her father. *Such was not the case.* The testamentary trustees, themselves, were the taxpayers as to income from such property during said period from January 1, 1916, to March 29, 1923, when actual distribution of the trust estate was made to Ruth Swift Maguire and her co-beneficiaries who were then surviving. During said period the revenue acts contained provisions expressly taxing to trustees income from any kind of property held in trust for future distribution under the terms of a will or trust.[3]

This being true, it could not also be true that "the time of the distribution to the taxpayer" of the properties involved herein was on December 11, 1905, when the estate of Gustavus F. Swift was closed in the Probate Court and such properties were thenceforth held in trust under the Swift will until they were delivered to the taxpayer and her sister and brothers.

IV.

THE STATUTE IS CLEAR AND IS NOT AMBIGUOUS.

The Court below, in order to reach its decision, was forced to find that the express language of the statute "is not unambiguous and definite." (R. 70.) In its opinion, the Court said:

"The term 'distribution' might refer to distribu-

3. Sec. 2(b) of the Revenue Act of 1916.
First Trust and Savings Bank v. *Smietanka, Collector* (C. C. A. 7th), 268 F. 230, 233.
Merchants Loan and Trust Co., Trustee v. *Smietanka*, 255 U. S. 509.

tion by the estate. *Jenkins* v. *Smith*, 21 F. Supp. 433; Dissenting opinion, *Commissioner* v. *Libbey*, 100 F. (2d) 458. If it might refer to delivery by the testamentary trust. *Harbison* v. *Commissioner*, 26 B. T. A. 896; *Libbey* case, *supra*. In the light of the conflict of thought on this point, we are not convinced that the express language of the statute is unambiguous and definite, as counsel for taxpayer would have us believe."

Such finding is contrary to and in direct conflict with every other authoritative construction of § 113 (a) (5) of the Revenue Act of 1928.

The First Circuit Court of Appeals, in the *Libbey* case, *supra*, said:

> "The meaning of the third clause of the statute is so plain that it does not call for construction."

The Second Circuit Court of Appeals, in the *Gambrill*, *Campbell*, *Knox* and *Rogers* cases, *supra*, said:

> "'It is hard to imagine language which would more clearly fix the basis for computing the gain or loss realized upon the sales of the securities with which the Commissioner had to deal than the words 'fair market value of the property at the time of the distribution to the taxpayer.'"

The Third Circuit Court of Appeals, in *Haskell* v. *Commissioner*, 78 F. (2d) 869, said (at page 870):

> "The language of the statute is clear and requires no construction."

The Sixth Circuit Court of Appeals, in *Williamson* v. *Commissioner*, 100 F. (2d) 735, expressed no doubt as to the clarity of the language used when it said (at page 738):

> "Its determination (34 B. T. A. 924) that the date of the actual receipt of the stocks is the basis instead of the date of the order of distribution is in accord with the words of § 113 (a) (5), which expressly states that the basis shall be the 'fair market value of the property at the time of the distribution to the taxpayer.'"

On the basis of its decision in the *Williamson* case, the Sixth Circuit Court affirmed the decision of the Board of Tax Appeals in *Taft* v. *Commissioner*, 101 F. (2) 1007.

The decision of the United States District Court in *Jenkins, et al.* v. *Smith, Collector*, 21 F. Supp. 433, is destroyed as a precedent by the decision of the United States Circuit Court of Appeals, Second Circuit, on June 10, 1940, in the *Gambrill, Campbell, Knox* and *Rogers* cases, *supra*. Upon the appeal of *Jenkins* v. *Smith*, *supra*, the sole issue submitted to the Circuit Court of Appeals for decision was that involving the service of notice and demand for tax by the Collector, such issue being referred to as Issue III in the opinion of the District Court. Inasmuch as the District Court decided that the plaintiffs, who were executors under the will of Jenkins, deceased, were entitled to recover the entire amount of the deficiency paid, for the reason that the Collector's demand and notice was not delivered to the taxpayers within ten days after receiving the assessment list, the remainder of the court's decision, holding that the term "distribution" in § 113 (a) (5) of the Revenue Act of 1932 referred to distribution by the executors and not a distribution by the testamentary trustees, is dictum.

The dissenting opinion in the *Libbey* case does not have the authority of a precedent.

As this Court declared in deciding *Old Colony Railway Company* v. *Commissioner*, 284 U. S. 552 (at 560):

> "The legislature must be presumed to use words in their known and ordinary signification. * * * The popular or received import of words furnishes the general rule for the interpretation of public laws. * * * As was said in *Lynch* v. *Alworth-Stevens Co.*, 267 U. S. 364, 370, 'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and ingenuity and study of

an acute and powerful intellect would discover.' This rule is applied to taxing Acts."

This Court held in *United States* v. *Merriam,* 263 U. S. 179, 187:

> "In statutes levying taxes, the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used."

Petitioner respectfully contends that the language of the applicable statute is so plain that there can be no doubt as to its meaning. The language of the statute is "so plain as to need no construction." *Helvering* v. *City Bank Farmers Trust Co.,* 296 U. S. 85, (at 89). The intention of Congress is to be sought for primarily in the language used. *Thompson* v. *United States,* 246 U. S. 547, 551. Where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it. *Hamilton* v. *Rathbone,* 175 U. S. 414, 419.

The suggested ambiguity in the statute arises primarily through the failure of the Court below to give proper consideration and weight to the words "to the taxpayer," which are the vital part of the third sentence of § 113 (a) (5) of the Revenue Act of 1928 (Point II herein). When the phrase "distribution to the taxpayer" is considered as a whole, it is obvious that the "distribution" to which Congress referred was the delivery of the property involved to the person who sold it and to whom the gain on such sale was to be taxed.

V.

THE LEGISLATIVE HISTORY RELATING TO THE ENACTMENT OF § 113 OF THE REVENUE ACT OF 1928 SUPPORTS THE POSITION OF THE TAXPAYER.

The opinion of the Court below points out (R. 71) that the change in the basis date for determining gain or loss from the sale of property passing by will or intestacy as incorporated in § 113 of the Revenue Act of 1928 was due to confusion as to the meaning of the term "date of acquisition" of such property by the taxpayer, which basis was provided by the prior Revenue Acts. Such confusion was ended by the decision of this Court in *Brewster* v. *Gage*, 280 U. S. 327.

The Revenue Act of 1928, as adopted, followed the report of the Conference Committee (Report No. 1882, 70th Congress, First Session). That report adopted the Senate Finance Committee's Report No. 960 (70th Congress, First Session), which had revised Section 113 (a) (5) and certain related sections, so as to provide that "in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest, or by intestacy" the basis should be "the fair market value of the property at the time of the distribtuion to the taxpayer."

The Senate Finance Committee's Report No. 960 and the Conference Report No. 1882 state that the rule fixing the basis in the cases above enumerated as the fair market value of the property at the time of the distribution to the taxpayer "would also apply in cases where the executor purchases property and distributes it to the beneficiary." The various revenue acts, beginning with the 1916 act, treated executors and testamentary trustees as fiduciaries. Since Congress, when passing the Revenue Act of 1928, construed the third sentence of § 113

(a) (5) as applying to cases where the executor purchased property and distributed it to a beneficiary, it inevitably follows that Congress intended that the third sentence of said Section should also apply in cases where testamentary trustees purchased property and distributed it to a beneficiary.

The Court below decided, in effect, that in enacting Section 113 (a) (5) of the Revenue Act of 1928, Congress intended to tax the beneficiary of a testamentary trust upon all increment accruing to property held by testamentary trustees.

As a matter of fact, the reports of the Congressional Committee relating to the Revenue Bill of 1934 (House Report No. 704 and Senate Report No. 558, 73rd Congress (Second Session)) expressly state that under Section 113 (a) (5) of the Revenue Act of 1932 (which was identical with the same section of the 1928 Act), in the case of a general bequest of personal property, an executor, who is also named as testamentary trustee, might determine whether it would be most advantageous to sell as executor or as trustee. Thus it clearly appears that in enacting the 1928 Revenue Act and the 1932 Revenue Act, Congress did not intend to tax all increment in value of personal property not specifically bequeathed.

In recommending the re-enactment in 1934 of the provision contained in the 1926 Act, which fixed value at "the date of acquisition" as the basis, both the House and the Senate Committee said:

> "The change in the 1928 Act was made because there was some doubt as to the meaning of the term 'date of acquisition,' which was the term used in the Revenue Act of 1926";

and that since the 1928 Act was passed, the Supreme Court had defined "date of acquisition" to mean the date of death in the case of all property passing by bequest,

devise and inheritance, whether real or personal. The Committees then recommended that § 113 (a) (5) of the 1934 Bill should conform to the language contained in the 1926 Act, so that a uniform basis rule might be required in the case of property passing at death, whether real or personal.

It is seen that the change in the 1934 Act was not made because "some evils had crept in," as stated by the Court below (R. 72), but because all doubt as to the meaning of the words "date of acquisition" had been removed by the decision of the Supreme Court in *Brewster* v. *Gage*, 280 U. S. 327.

VI.

THE COURT ERRED IN CONCLUDING THAT "PROPERTY PURCHASED BY THE TRUSTEES AND DISTRIBUTED TO THE TAXPAYER" WAS NOT "ACQUIRED BY WILL".

The Commissioner argues and the Court below found that certain property purchased by the testamentary trustees and distributed to the taxpayer was not property "transmitted at death"; that therefore it was not property acquired by will, but was property acquired by purchase and the cost thereof to the testamentary trustees is taxpayer's basis (R. 74).

Petitioners submit that while such property may have been acquired by trustees by purchase, the taxpayer to whom such property was "delivered" acquired it under, by virtue of, and in accordance with, the terms and provisions of the will of taxpayer's father; that such property was "acquired" by will within the meaning of said Sec. 113 (a) (5); and that taxpayer's basis for determining gain is the fair market value of such property "at the time of the distribution to the taxpayer" on March 29, 1923.

The United States Board of Tax Appeals in its decision in the case of *Fleming* v. *Commissioner of Internal Revenue*, 36 B. T. A. 773 (at page 777) sustained the contention of the Commissioner of Internal Revenue that securities purchased by testamentary trustees and by them distributed to residuary legatees under a will was "property acquired by will". The Board said:

> "It may well be that these securities were purchased by the testamentary trust, and that the title to them was then acquired by petitioner, remainderman. (Citations) However, our immediately pertinent question is not *when* but *how* the petitioner, remainderman under the will of her father, not the trustee, acquired these securities. * * * the testamentary trustee was not the agent of petitioner, the remainderman. The trustee was the creature of the decedent, made so by his will. It was thus designated as the continuing instrumentality of the decedent to execute his and not the will of the petitioner, remainderman. She neither controlled the terms of the trust nor its *res* until distributed to her. All she had before that distribution was a right to share therein in accordance with the terms of the testamentary trust, the right to which vested in her at the death of decedent. (Citations) Thus, it was by virtue of the provisions of the testamentary trust created by the will of her father, that petitioner was the remainderman under that trust and received the securities in question. They may have been purchased by the trustee, but the petitioner acquired them by will."

In so deciding, the Board of Tax Appeals sustained the contention of the Commisisoner of Internal Revenue that the property purchased by the testamentary trustee was acquired by will.

In the case of *Commissioner* v. *Gambrill, supra,* the United States Circuit Court of Appeals (2nd Circuit) held (at page 533) that any property distributed by a testamentary trustee, which is part of the corpus of the trust, "is acquired through and by virtue of the will.

Through the will the remainderman derived all their interests and without it they would have had no standing and would have received nothing." The Court cited *Lyeth* v. *Hoey*, 305 U. S. 188, where the Supreme Court held that the value of property received by an heir from the estate of a decedent, in compromise of his claim that the decedent's will was invalid, was property acquired by inheritance within the meaning of the Federal income tax law.

The Court below placed undue emphasis upon the words "Property Transmitted at Death". The question is whether the property involved herein was "acquired by will." The words "Transmitted at Death" are merely a subheading of Sec. 113 (a) of the 1928 Act, relating to property acquired by will or by intestacy. As stated by the United States Supreme Court in *Caminetti* v. *United States*, 242 U. S. 470, 490:

> " * * * the name given to an act by way of designation or description or the report which accompanies it, cannot change the plain import of its words. If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.
>
> "Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation. But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to, or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent."

CONCLUSION.

The property sold in 1929 and 1930 was distributed to the taxpayers on March 29, 1923, and the fair market value of the property on that date is the proper basis for determining gain on the sale thereof. The decision of the United States Circuit Court of Appeals (Seventh Circuit) should be reversed.

Respectfully submitted,

ALBERT H. VEEDER,
FRANCIS E. BALDWIN,
33 South Clark Street,
Chicago, Illinois,
Attorneys for Petitioners.

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APPENDIX.

APPLICABLE STATUTE.

Sec. 113. *Basis for Determining Gain or Loss.*

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(5) *Property Transmitted at Death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death;

(b) *Property acquired before March 1, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be:

(1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided), or

(2) the fair market value of such property as of March 1, 1913, which ever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913,

due regard shall be given to the fair market value of the assets of the corporation as of that date.

Sec. 701. *Definitions.*

(a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

* * * * *

(13) The term "taxpayer" means any person subject to a tax imposed by this Act.

UNITED STATES BOARD OF TAX APPEALS.

OPINION AND DECISION.

Although the Union Terminal Trust and the Swift Family Realty Trust returned as taxable income the capital gains realized by those trusts in 1930 the petitioners now admit that they are taxable upon the capital gains realized by the trusts in 1930 which is in accordance with the determination of the respondent. Each petitioner is, therefore, taxable upon one-eighth of the total capital gain realized by the trusts in 1930.

The only question presented to the Board for decision upon the main issue is whether the basis for computing the gain from the sale of the assets by the trusts is the fair market value of the assets on March 29, 1923, when the assets were distributed by the testamentary trustees to the beneficiaries, the taxpayers herein, as claimed by the petitioners, or the fair market value of the assets on December 11, 1905, when the assets were delivered by the executors to themselves as trustees, or the March 1, 1913, value of the assets, whichever is greater, as contended by the respondent.

Section 113 (a) (5) of the Revenue Act of 1928 reads as follows:

Basis For Determining Gain Or Loss.

(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent.

> In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death.

The property here in question consisting of shares of capital stock of corporations and notes and accounts receivable was personal property acquired by the taxpayers by a general devise, not by "specific bequest," under the will of their father and the basis prescribed by the statute is "the fair market value of the property at the time of the distribution to the taxpayer." The difference between the petitioners and the respondents is "the time of distribution" to the taxpayers of their interests in the residuary estate of their father.

The respondent points to the fact that during the period when the residuary estate of Gustavus F. Swift was held by the testamentary trustees from December 11, 1905, to March 29, 1923, there was an increase in the value of the trust assets and that the testamentary trustees acquired additional assets during that period. He argues that to the extent that there was an increase in the value of the residuary estate during the period that it was held by the testamentary trustees such increase in value entirely escapes income tax if the value at March 29, 1923, is used as the basis. He submits that this was not the intention of Congress when it incorporated into the Revenue Act of 1928 section 113 (a) (5).

The language of the statute above quoted, however, is clear and unambiguous. The basis laid down by the statute is "the fair market value of the property at the time of the distribution to the taxpayer." The respondent submits that the executors distributed the assets of the estate to the testamentary trustees on December 11, 1905, and that that distribution was the distribution referred to by the statute. The law says, however, "distribution to the tax-

payer." The testamentary trust was not the taxpayer. The taxpayers are the petitioners herein, or their decedents, to whom the assets were distributed by the testamentary trustees on March 29, 1923.

The question as to when the distribution of property takes place under facts similar to those here involved has been considered by the Board and the courts in a number of cases. In *Ralph W. Harbison,* 26 B. T. A. 896 (reversed on another point in *Harbison* v. *Commissioner,* 68 Fed. (2d) 1004), on facts not materially different from those in the instant case, we held, after reviewing the legislative history of section 113 (a) (5) of the 1926 Act and the decision of the Supreme Court in *Brewster* v. *Gage,* 280 U. S. 327, that the time of distribution to the taxpayers and therefore the basic valuation date under the statute was the date on which the property was distributed to them upon the termination of the testamentary trust created by the will of their father and not the March 1, 1913, value as the Commissioner contended. To the same effect is *Arthur E. Braun, Trustee,* 29 B. T. A. 1161; *Harwood Robbins,* 33 B. T. A. 880; *Robert A. Taft, Trustee,* 34 B. T. A. 603; affd., *Commissioner* v. *Taft* (C. C. A., 6th Cir.), ... Fed. (2d) ....., decided January 10, 1939; *Margaret E. B. Fleming,* 36 B. T. A. 773; *Haskell* v. *Commissioner,* 78 Fed. (2d) 869; certiorari denied, 296 U. S. 652; *Van Nostrand* v. *United States,* 18 F. Supp. 295; affd., 94 Fed. (2d) 510; *Commissioner* v. *Libbey* (C. C. A., 1st Cir.), ... Fed. (2d) ....., decided December 28, 1938. In *Harwood Robbins, supra,* we said:

> The phrase "the time of the distribution" as used in the 1928 Act must necessarily relate to the time at which the property is actually delivered to or made available for the use of the distributee or someone acting for him by the executors, administrators, or others having lawful possession or control thereof. * * *

In *Commissioner* v. *Libbey, supra,* the court held that the basis for computing gain or loss on the sale in 1932 of shares of stock distributed to the taxpayer in 1921, by trustees of her father's estate, was the value of the shares of stock at the time of the actual distribution to the taxpayer in 1921. Respondent states in his brief in these proceedings that the Libbey case is not distinguishable from the case at bar.

Upon authority of the cited cases we hold that the time of the distribution to the taxpayers of the property which they acquired from the residuary trust estate created by the will of their father was the time at which it was distributed to them by the testamentary trustees upon termination of the trust estate on March 29, 1923. The contentions of the petitioners on this issue are therefore sustained and the tax liabilities as to petitioner's gain on the sale of these assets will be redetermined in accordance with the stipulation as to the value of such assets on the basic date.

DECISION.

Pursuant to the Memorandum Findings of Fact and Opinion of the Board entered February 28, 1939, the respondent herein having on March 21, 1939, filed a recomputation and the petitioner having on March 27, 1939, filed an acquiescence therein, now therefore, it is

Ordered and Decided: That there is a deficiency in income tax for the year 1930 in the amount of $46,443.60.

Enter:

(Signed) CHARLES P. SMITH,
Member.

Entered Mar. 29, 1939.

Commissioner of Internal Revenue v. *Maguire, et ux.*

No. 7049.

CIRCUIT COURT OF APPEALS.

Seventh Circuit.

March 5, 1940.

Rehearing denied May 21, 1940.

Before EVANS, MAJOR, and KERNER, *Circuit Judges.*
KERNER, *Circuit Judge.*

This is a petition to review an order of the Board of Tax Appeals, in a proceeding for determination of an alleged deficiency in respondent's income tax for the calendar year 1930. The Commissioner of Internal Revenue had asserted a deficiency of $71,429.62. The Board on March 29, 1939 entered its order finding a deficiency in the amount of $46,443.60.

Gustavus Swift, a resident of Illinois, died on March 29, 1903. He left surviving him his widow and nine children, one of whom, Ruth S. Maguire, and her husband are the respondents herein. He left a will which was duly admitted to probate in the Probate Court of Cook County, Illinois, on May 2, 1903, in which he devised and bequeathed to his executors and trustees in trust his residuary estate, to hold the same and to pay certain payments annually commencing with the date of his death and continuing until the final distribution of his estate.

By clause 8 of his will the trustees were directed to distribute the corpus not less than ten nor more than twenty years after his death among his widow and children in certain specified proportions.

On December 11, 1905 the Probate Court of Cook County entered an order approving the final account of and discharging the executors, and directed them to turn over to themselves as trustees the balance of the estate in accordance with the provisions of the will. Thereafter, the trustees continued to administer the estate as such trustees until March 29, 1923, when the securities received by the trustees, together with other securities subsequently purchased by them, were distributed in kind to the respondent Ruth S. Maguire. Thereafter in 1929 and 1930 certain of the securities were sold.

The taxing statute provides that in the case of property *acquired after 1913* the basis for determining gain or loss is cost. § 113(a), Revenue Act of 1928, c. 852, 45 Stat. 818, 26 U. S. C. A. Int. Rev. Code, page 380. However, as to real property passing by will and personal property specifically bequeathed, the basis is the value of the property at the death of the testator; except that as to personal property passing by general bequest, the basis is the "value of the property at the time of the distribution to the taxpayer." § 113(a) (5).

The taxing statute also provides that in the case of property *acquired before 1913* the basis is cost or 1913 value, whichever is greater. § 113(b). However, as to real property passing by will and personal property specifically bequeathed, the basis is value at death or 1913 value, whichever is greater; except that as to personal property passing by general bequest, the basis is value at distribution to the taxpayer or 1913 value, whichever greater. § 113(b).

In the instant case the property in question was personal property, consisting of shares of capital stock of certain corporations, certain accounts and notes receivable. Some passed under the will by general bequest, and was distributed by the executors to the testamentary trustees in 1905. Some property was purchased by the trustees between 1905 and 1913, and some was purchased between 1913 and 1923. In 1923 the testamentary trustees delivered the properties to the taxpayer.

The taxpayer reasons that the property in question was property acquired by will, and therefore the basis is its value at the time of distribution to the taxpayer. In this regard she contends that although some of the property was purchased by the testamentary trustees, it nevertheless was acquired under and pursuant to the will.[1] On the other hand, the Government argues that the property subsequently purchased by the trustees was acquired by purchase. As to this property the Government contends that the basis is its cost to the trustees.[2]

This court must answer two questions in this case: (1) To what does the language "distribution to the taxpayer" refer—distribution by the estate or delivery by the trust? (2) What is the proper basis of the properties received by the taxpayer? In this connection the Board of Tax Appeals agreed with the taxpayer's position, and decided that the basis was the value of the properties in 1923, at which time there was "distribution to the taxpayer."

The controversy here is over the proper construction of a section of the 1928 revenue statute to the effect that in the case of personal property passing by general be-

1. Taxpayer claims that the date of acquisition, *i. e.*, before or after 1913, is immaterial in the instant case. In saying this, taxpayer proceeds on the theory that no matter when the property was acquired, the property being acquired by virtue of the will takes the basis given for property passing by will, and in this case the following occurs: if the property was acquired after 1913, the basis is the value at time of distribution (claimed to be the year 1923 when the property was delivered to the taxpayer), § 113(a)(5); if acquired before 1913, the basis is still the 1923 value (because greater than 1913 value), § 113(b). Even if the Government agreed as to the point on acquisition, it disagrees as to the date when there is distribution to the taxpayer, claiming the date to be the year 1905 when the estate was closed.

2. In greater detail the Government's contention is as follows. As to property purchased between 1905 and 1913, § 113(b) applies: the basis is cost or 1913 value whichever greater. As to property purchased between 1913 and 1923, § 113 (a) applies: the basis is cost. As to these properties, each is acquired by the taxpayer in the year the trustees purchased it, and the cost in each instance is the cost to the trustees in the year of purchase.

quest, the basis is the "value of the property at the time of the distribution to the taxpayer." The term "distribution" might refer to distribution by the estate. *Jenkins* v. *Smith,* D. C., 21 F. Supp. 433; *Dissenting opinion, Commisisoner* v. *Libbey,* 1 Cir., 100 F. 2d 458. Or it might refer to delivery by the testamentary trust. *Harbison* v. *Commissioner,* 26 B. T. A. 896; *Libbey* case, *supra.*

In the light of the conflict of thought on this point, we are not convinced that the express language of the statute is unambiguous and definite, as counsel for taxpayer would have us believe. Every statute is to be construed with reference to its intended scope and to the purpose of the legislature in enacting it; and where language is used which admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and carry out the purpose of the statute, being mindful, however, that it is not permissible under the pretense of interpretation to make a law, either by extension or restriction, which shall depart from the legislative intent. In such a situation, resort to aids outside the language itself is necessary. *Brown* v. *Duchesne,* 60 U. S. 183, 194; *Helvering* v. *New York Trust Co.,* 292 U. S. 455, 464; *Helvering* v. *Morgan's Inc.,* 293 U. S. 121, 126. For instance, often one finds the answer to the controversy in legislative history.

Legislative History. The 1921 to 1926 Acts provided that the basis of property passing by will was its value at the time of such "acquisition." Considerable difficulty was experienced in determining the date of acquisition, particularly in cases where the property was sold by the estate of the decedent. See *Bankers' Trust Co.* v. *Bowers,* D. C., 23 F. 2d 941; cf. *McKinney* v. *U. S.,* 62 Ct. Cl. 180. So the language was changed, and as changed incorporated in the 1928 Act. In this connection the legislative comments are pertinent.

The House bill provided that the basis of property passing by will should be its value at the death of the testator, since the "value on the date of death affords an equitable and more readily determinable basis." Ways and Means Committee Report, No. 2, 70th Cong., 1st Sess., p. 18 (1928 Act). The House bill thereby disposed of the confusion caused by the McKinney case, *supra,* by supplying the value-at-death basis to sales of property by the estate, the same basis as used where the property is sold by the beneficiary.

The Senate, however, deemed the House bill weak in one respect, in that it failed to take care of the situation where "the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis * * * for the decedent never owned the property." Finance Committee Report, No. 960, 70th Cong., 1st Sess., p. 26 (1928 Act). Accordingly, the Senate amended the House bill.

As amended, the bill provided that the basis of property passing by will should be value-at-death, except that the basis of personal property passing by general bequest should be the value "at the time of the distribution to the taxpayer." From what has been said, it would appear that Congress was not looking beyond the distribution by the estate. Lending to this appearance is the weight given to the value-at-death rule and the reason given for the exception thereto. It is also easy to conclude that acquisition by the beneficiary was a factor in the minds of the legislators.

We quote again from the legislators: "In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis * * *. The same rule is applied to real and personal property transmitted by the decedent where the sale is made by the executor. In all other cases the basis is the fair market value * * * at the time of distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property * * * transmitted to the beneficiary * * * by general bequest * * *. It would also apply in cases where the executor purchases property and distributes it to the beneficiary." Conference Report, No. 1882, 70th Cong., 1st Sess., p. 14 (1928 Act).

The change in language was incorporated in the 1928 and 1932 Acts, but the difficulty in administering the section continued. Now the difficulty was in the construction of the words "time of distribution." However, in the meantime, the former language "time of acquisition" had been judicially defined to mean "time of death" of the decedent. *Brewster* v. *Gage*, 280 U. S. 327. The reason for the 1928 change existed no longer, and in 1934 Congress reverted to the former language to the effect that

in cases where property is transmitted at death the basis shall be the value at the "time of such acquisition."

Legislative comments in 1934 indicated that the change in the 1934 law was made because the reason for the 1928 language had disappeared and some evils had appeared.[3] Thus, the legislators expressed concern because the existing law permitted situations where an executor-trustee under a will could sell property either before or after distribution to himself as trustee, thereby avoiding taxable gains which accrued between the death of the testator and the distribution by the estate. No concern, however, was expressed over the consequences inherent in situations which would result from considering delivery by the trustee as the "distribution" meant by the tax statute, thereby permitting avoidance of tax gains accruing between death and distribution by the trustee. The inference is strong that Congress was not looking beyond the distribution by the estate, when it wrote the language in controversy. "*Distribution to the Taxpayer.*" As already mentioned, one often finds the meaning of words by reading their origin and purpose. The bare words "distribution to the taxpayer" tell a plain story when placed in their context and defined in the light of their history. In providing the tax basis for property transmitted at death, Congress did not intend the valuation date to go beyond the time when the estate was closed. The phrase relates to the time when the property is distributed by the executor.

Nor is logic offended by our construction. That

3. We quote material parts from the 1934 legislative reports:

"Thus, where a trustee acquires personal property by general bequest, the basis of the property, on a sale by him, is the value at the time of distribution to him. The basis to the executor, in all cases, is the value of the property at the date of decedent's death.

"Often times, the executor and trustee under a will are one and the same person. Thus, in the case of a general bequest of personal property, he is in a position to make use of one basis of valuation or the other * * *. The trustee, of course, may use a later basis than the executor, and where it is desired to sell * * * the executor-trustee may determine whether it would be most advantageous to sell as executor or trustee. Where the personal property has increased in value * * * the property may be distributed to the trustee, who may use the higher basis * * * thereby diminishing the taxable increment * * *." Finance Committee Report, Senate, No. 558, 73rd Cong., 2nd Sess., pp. 34-35 (1934 Act).

The same committee added that the 1934 change made it "clear that if the property of the decedent is sold by the executor or other representative of the estate of the decedent, the basis * * * is the fair market value at the death of decedent, which is the same basis adopted * * * when the property is sold by the beneficiary."

the distribution by the estate be to a trustee for the use of the taxpayer in some cases, rather than to the taxpayer himself in every case, matters little. As a matter of logic, where the taxpayer has a substantially vested equitable ownership at the time of distribution to the trustee, then distribution to the trustee is distribution to the taxpayer. The subsequent delivery by the trustee to the taxpayer merely transfers the legal title. *Croxall's Lessee* v. *Sherrerd,* 72 U. S. 268, 281; *Merchants' Loan & Trust Co.* v. *Patterson,* 308 Ill. 519.

We conclude, therefore, that the phrase "time of distribution to the taxpayer" as used in § 113(a) (5) of the 1928 Act means time of distribution by the decedent's estate, and it follows consequently that the time of such distribution in the instant case was December 11, 1905. Moreover, the basis of the property coming to the taxpayer from the executors, through the testamentary trustees, is the 1905 value or the 1913 value of such property, which ever was greater. § 113 (b).

Basis of Property Purchased by Trustees. In the instant case the property in question consists of property transmitted at death and of property subsequently purchased by the trustees under powers given in the will. The taxpayer contends that although some of the property was purchased by the trustees, nevertheless she acquired the properties by will, and therefore the properties take the basis as given in § 113(a) (5). *Fleming* v. *Commissioner,* 36 B. T. A. 773, 777; see footnote 1.

That the taxpayer's right in the properties has its source in the provisions of the will, is certain; but certain too are we that this factor does not control the application of the basis section, § 113(a) (b). For our conclusion we depend considerably on the history that has been related above. It is plain therefrom that the legislators distinguished between specific property owned by the decedent and specific property purchased after decedent's death by the trustee. And they also deemed important the time when these properties were acquired.

For our conclusion we also depend considerably on the statutory scheme. In general the statute applies a cost basis to property acquired by the taxpayer.[4] To some

4. A more accurate statement would mention that as to property acquired before 1913, the basis is cost or 1913 value, whichever greater, § 113(b).

situations the statute applies a different basis, *e. g.*, § 113(a) (5). For instance, in the instant case, the statute makes an exception to the cost basis. This exception, however, applies only to "property transmitted at death." To us this means that the exception, *i. e.*, the value-at-death and value-at-distribution basis, is confined to the specific property owned by the testator at his death.

We conclude, therefore, that property purchased by the trustees is not "property transmitted at death," and that as to it the basis is as described in footnote No. 2. In this connection we may add the following explanation. Where the identical property distributed to the trustees is later delivered to the taxpayer in kind, it may be said that under the statute the taxpayer acquired the property "by will." However, where the trustees buy different property after the distribution, and this property is delivered to the taxpayer, it may be said that it was acquired by purchase and not "by will."

The order of the Board of Tax Appeals is reversed, and the case remanded for further proceedings not inconsistent with the views herein expressed. It is so ordered.

Reversed and remanded.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 346

JEREMIAH D. MAGUIRE AND RUTH S. MAGUIRE,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS.

ALBERT H. VEEDER,
FRANCIS E. BALDWIN,
33 South Clark Street,
Chicago, Illinois,
Attorneys for Petitioners.

THE BLAKELY-WARREN PRINTING COMPANY, 212 WEST JACKSON, CHICAGO

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IN THE

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OCTOBER TERM, 1940.

No. 346.

JEREMIAH D. MAGUIRE AND RUTH S. MAGUIRE,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS.

Opinion Below.

The opinion of the United States Circuit Court of Appeals (7th Circuit) (R. 68-75) is reported at 111 F. (2d) 843.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals (7th Circuit) was entered on March 5, 1940, and petition for rehearing filed by the Petitioners herein was denied on May 21, 1940. The petition for certiorari was filed August 17, 1940, and was granted on October 14, 1940. The Jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended, 43 Stat. at L. 938 (U. S. C. A. Title 28, § 347).

Statement of the Case.

The facts herein are not in dispute and have been stipulated (R. 14-30). They may be summarized as follows:

Gustavus F. Swift died on March 29, 1903, leaving nine children surviving him, one of whom died in 1911. Ann M. Swift, the widow of Gustavus F. Swift, died on May 19, 1922 (R. 32). The Petitioner, Ruth Swift Maguire (*hereinafter sometimes called the "taxpayer"*) is one of the eight children of Gustavus F. Swift who were surviving on March 1, 1913, and also on March 29, 1923 (R. 15, 16).

Gustavus F. Swift, by his last will and testament, after devising and bequeathing to his widow certain real estate on which the family residence stood, together with all household furniture and other property used in connection with said residence, devised and bequeathed, generally and not specifically, to Louis F. Swift, Edward F. Swift and Edward Tilden, as executors and trustees, the residue of his estate. The will directed the executors and trustees to make certain payments annually commencing with the date of the testator's decease and continuing until the final distribution of the estate, and, after payment of all debts of decedent, to make certain partial distributions to members of decedent's family and other relatives. By clause 8 of said will, the executors and trustees were further directed:

> "to make a final distribution of all the rest and residue of my estate among my wife and children, at any time in their judgment and discretion after the expiration of ten (10) years from and after the date of my decease, but not before, and in any event, not later than twenty (20) years thereafter, giving to my wife the one-third part thereof, the balance to be divided among my children, share and share alike, and should my wife not be living at the time of such distribution, then the same shall be divided equally among my children, share and share alike, the descendants of any deceased children in such distribution to take the proportion of their deceased parent" (R. 25, 26).

On December 11, 1905, the Probate Court of Cook County, Illinois, entered an order approving the final account of the executors of the Estate of Gustavus F. Swift, and directing the executors to turn over to themselves, as trustees, the remainder of the estate in their hands, which they did on that date (R. 16). On March 29, 1923, the personal property thus received by the testamentary trustees from the executors of the Estate of Gustavus F. Swift, together with other personal property purchased subsequently by the testamentary trustees, was distributed by them in kind to the eight children of said Gustavus F. Swift who were then surviving, including the taxpayer (R. 34, 35). This personal property consisted of shares of the capital stock of certain corporations and bills and accounts receivable. By agreement between the taxpayer and her co-beneficiaries, the testamentary trustees under the will of Gustavus F. Swift delivered all of said property to the trustees of two *inter vivos* trusts, Union Terminal Trust and Swift Family Realty Trust, which the taxpayer and her co-beneficiaries had created for the purpose of selling said properties and distributing the proceeds thereof to the taxpayer and her co-beneficiaries under the will of Gustavus F. Swift. The property was sold by the two trusts in 1929 and 1930 (R. 34, 35).

On March 13, 1933, the Commissioner of Internal Revenue asserted a deficiency in income tax of Petitioners for the calendar year 1930 in the amount of $71,429.62 (R. 8). In determining the amount of the deficiency, the Commissioner used, as the bases for computing gain on the sale of the personal property distributed by the testamentary trustees to the taxpayer as a residuary legatee under the will of her father, Gustavus F. Swift, (1) the fair market value on December 11, 1905, or the March 1, 1913, value, whichever was greater, of such property as was received by the testamentary trustees from the executors of Gustavus F. Swift and (2) the cost of personal

property purchased by the testamentary trustees and by them distributed to the taxpayer and her co-beneficiaries on March 29, 1923 (except that the March 1, 1913, value of property purchased before that date was said to control if it exceeded cost).

The Commissioner at the same time asserted a deficiency in income tax for the calendar year 1930, calculated upon the same bases, against each of the other seven surviving beneficiaries of the testamentary trust created by the will of Gustavus F. Swift. Petitioners and the seven other beneficiaries contested the asserted deficiencies before the United States Board of Tax Appeals, claiming that there had been no distribution to them under Section 113 (a)(5) of the 1928 Revenue Act until March 29, 1923, when they received the property here involved from the testamentary trustees (R. 14, 15).

On January 28, 1939, the Board of Tax Appeals rendered its memorandum findings of fact and opinion in the cases before it, known as *Jeremiah D. Maguire and Ruth S. Maguire, Petitioners* v. *Commissioner of Internal Revenue, Respondent,* B. T. A. Docket No. 72216, and of *Harold H. Swift, Gustavus F. Swift, Charles H. Swift, Charles H. Swift, et al., Executors, Estate of Edward F. Swift, Deceased, Louis F. Swift, Jr., et al., Executors, Estate of Louis F. Swift, Deceased, Helen Swift Neilson,* and *George H. Swift, Petitioners* v. *Commissioner of Internal Revenue, Respondent,* B. T. A. Docket Nos. 90338 to 90344, both inclusive. On March 29, 1939, the Board of Tax Appeals made its decision in B. T. A. Docket No. 72216, holding that the property involved herein was distributed to taxpayer on March 23, 1923, and that there was a deficiency in income tax of Petitioners for the calendar year 1930 in the amount of $46,433.60, which is admitted by Petitioners to be correct (R. 31-47).

In deciding this case, and the related cases, the Board of Tax Appeals found that

"the language of the statute above quoted, however,

> is clear and unambiguous. The basis laid down by the statute is 'the fair market value of the property at the time of the distribution to the taxpayer.' * * * The testamentary trust was not the taxpayer. The taxpayers are the petitioners herein, or their decedents, to whom the assets were distributed by the testamentary trustees on March 29, 1923 * * *.
>
> "Upon authority of the cited cases we hold that the time of the distribution to the taxpayers of the property which they acquired from the residuary trust estate created by the will of their father was the time at which it was distributed to them by the testamentary trustees upon termination of the trust estate on March 29, 1923" (R. 38, 39).

On June 21, 1939, Respondent filed in the United States Circuit Court of Appeals for the Seventh Circuit under its No. 7049 his petition for review and assignments of error in this case (R. 48-53) and in the cases of the other seven beneficiaries of the testamentary trust. On July 7, 1939, the Circuit Court of Appeals, upon the joint motion of the Commissioner of Internal Revenue and the Respondents in each of the eight cases, entered an order herein providing as follows:

> "5. In the event that application shall be made by either party to the Supreme Court of the United States for a writ of certiorari in the said case of *Guy T. Helvering, Commissioner of Internal Revenue, Petitioner on Review* v. *Jeremiah D. Maguire and Ruth S. Maguire, Respondents on Review*, then pending final disposal of said case by the Supreme Court no Order for Mandate or Mandate shall issue in any of the other seven cases, and upon final disposition of said case by the Supreme Court, an Order for Mandate and Mandate similar to those which may be made and issued by this Court in the said Maguire case shall be made and issued by the Court in each of the said other cases" (R. 55, 56).

The principal issue in the Circuit Court of Appeals was the construction to be placed upon the words "at the time of the distribution to the taxpayer", as those words are used in the third sentence of § 113 (a) (5) of the Revenue Act of 1928 in determining the proper basis for computing

the gain to the taxpayer from the sale of the personal property delivered to her on March 29, 1923, by the testamentary trustees and sold by the trustees of Union Terminal Trust in the calendar year 1930, and by the trustees of Swift Family Realty Trust in the calendar year 1929. Sixty per cent of the gain from the sale made in 1929 by the Swift Family Realty Trust is taxable in the calendar year 1930. Income taxes for the calendar year 1929 are not in dispute. Petitioners and Respondent have stipulated that the beneficiaries of the testamentary trust, Ruth Swift Maguire, Harold H. Swift, Gustavus F. Swift, Charles H. Swift, Edward F. Swift, Louis F. Swift, Helen Swift Neilson, and George H. Swift, are taxable as though the sales made were made by said beneficiaries individually (R. 19, 20, 21).

Petitioners and respondent have stipulated the amount of taxable gain if the proper basis of all such personal property so sold is the fair market value thereof on March 29, 1923, when the property was delivered by the testamentary trustees to the beneficiaries of the trust, which Petitioners contend was "the time of the distribution to the taxpayer". They have also stipulated the amount of taxable gain if the proper bases were: (1) as to property received by the testamentary trustees from the executors of Gustavus F. Swift, the fair market value thereof on December 11, 1905, or on March 1, 1913, whichever was greater; and (2) as to property purchased by the testamentary trustees, the cost thereof to them (except that the March 1, 1913, value of property purchased before that date should control if it exceeded cost) (R. 19, 20, 21).

The decision of the Circuit Court of Appeals herein sustained the contentions of the Commissioner of Internal Revenue as to the bases for computing gain on the sale of the personal property involved herein, reversed the order of the Board of Tax Appeals, and remanded the cause for further proceedings not inconsistent with the

views expressed in the opinion of the Circuit Court of Appeals (R. 68-75).

The Circuit Court of Appeals held that the phrase "time of the distribution to the taxpayer", as used in § 113 (a) (5) of the 1928 Act, means "time of distribution by the decedent's estate, and it follows consequently that the time of such distribution in the instant case was December 11, 1905. Moreover, the basis of the property coming to the taxpayer from the executors, through the testamentary trustees, is the 1905 value or the 1913 value of such property, whichever was greater. § 113 (b)" (R. 73).

As to property purchased by the testamentary trustees and distributed to the taxpayer on March 29, 1923, the court concluded that such property was not property transmitted at death, that it was acquired by the taxpayer by purchase and not by will, and that as to it, the taxpayer's basis was the cost to the testamentary trustees or the March 1, 1913 value, whichever was greater (R. 74, 70).

Statute.

§ 111 (a), § 113 (a) (5), § 113 (b) (1) and (2), and § 701 (a) (1) * * * (13) of the Revenue Act of 1928, (c. 852, 45 Stat. at L. 791) contain the applicable provisions of the statute (Appendix, *infra*).

Errors Assigned.

The errors assigned and urged are:

(1) *The decision of the Circuit Court of Appeals is erroneous in holding "that the phrase 'time of distribution to the taxpayer' as used in § 113 (a) (5) of the 1928 Act means time of distribution by the decedent's estate, and it follows consequently that the time of such distribution in the instant case was December 11, 1905. Moreover, the basis of the property coming to the taxpayer from the executors, through the testamentary trustees, is the 1905 value or the 1913 value of such property, whichever was greater § 113 (b)"* (R. 73).

(2) *The decision of the Circuit Court of Appeals*

is erroneous in holding that property purchased by testamentary trustees and by them distributed to the taxpayer is property acquired by the taxpayer "by purchase" and not "by will" and that taxpayer's basis therefor is the cost to the trustees, or the value thereof on March 1, 1913, whichever was greater. (R. 74).

Questions Presented.

The principal contested issue herein is the construction to be given to the term "the time of the distribution to the taxpayer", as used in the third sentence of § 113 (a) (5) of the Revenue Act of 1928, Chapter 852, 45 Stat. at L. 791, in determining the proper basis for computing the gain of the taxpayer Ruth Swift Maguire from the sale of personal property acquired by her by general bequest under the will of her father, Gustavus F. Swift.

Petitioners have contended and here contend that the term "at the time of the distribution to the taxpayer" refers to the time of delivery to the taxpayer and that the proper basis for determining taxpayer's gain from the sale of the property here involved was its fair market value on March 29, 1923, when the testamentary trustees under the will of Gustavus F. Swift delivered such property to the taxpayer, Ruth Swift Maguire.

Respondent contends (1) that as to such of said property as was distributed by the executors of the will of Gustavus F. Swift, deceased, to themselves as testamentary trustees on December 11, 1905, and by them delivered to the taxpayer, Ruth Swift Maguire, on March 29, 1923, the proper basis is the fair market value of such property on December 11, 1905, or on March 1, 1913, whichever was greater; and (2) that as to such of said property as was purchased by the testamentary trustees subsequent to December 11, 1905, and distributed to the taxpayer on March 29, 1923, the taxpayer's proper basis is the cost to the testamentary trustees or its March 1, 1913, value, if it exceeded the cost.

SUMMARY OF ARGUMENT.

I.

The decision of the Court below is in direct conflict with decisions of the United States Circuit Courts of Appeals for the First and Second Circuits, which decided the specific question here involved. It also conflicts in principle with decisions of the Third and Sixth Circuit Courts of Appeals which hold that the term "distribution to the taxpayer" means "delivery to the taxpayer."

II.

The Court below erred in construing the applicable statute, because the Court failed to recognize that the controlling words in the statutory phrase "at the time of the distribution to the taxpayer" are the words "to the taxpayer."

III.

The words "distribution to the taxpayer," as used in the third sentence of § 113 (a) (5) of the Revenue Act of 1928, mean "delivery to the taxpayer".

IV.

The statute is clear and is not ambiguous.

V.

The principles of statutory construction applicable to this case are firmly established by numerous decisions of

this Court. The legislators must be presumed to have used words in their known and ordinary signification.

VI.

The legislative history relating to the enactment of § 113 of the Revenue Act of 1928 sustains the position of the taxpayer.

VII.

Property purchased by testamentary trustees and distributed to the taxpayer was acquired by the taxpayer by will.

ARGUMENT.

I.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH DECISIONS OF THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE FIRST AND SECOND CIRCUITS.

The specific questions here involved have been decided contrary to the decision of the Court below by the First Circuit Court of Appeals in *Commissioner of Internal Revenue* v. *Libbey,* 100 F. (2d) 458, and the decision of the Second Circuit Court of Appeals in *Commissioner of Internal Revenue* v. *Richard Van Nest Gambrill,* 112 F. (2d) 530; *Commissioner of Internal Revenue* v. *Marjorie K. Campbell,* 112 F. (2d) 530; *Commissioner of Internal Revenue* v. *Seymour H. Knox,* 112 F. (2d) 530; and *Commissioner of Internal Revenue* v. *Dorothy K. Rogers,* 112 F. (2d) 530.

The *Gambrill* and the *Knox* cases, *supra,* involved the question of the basis for determining gain or loss under § 113 (a) (5) of the Revenue Act of 1928. The *Libbey, Campbell* and *Rogers* cases involved the question of the basis for determining gain or loss under § 113 (a) (5) of the Revenue Act of 1932, which is identical with § 113 (a) (5) of the Revenue Act of 1928. In each of these cases, the property sold was personal property received by general bequest from testamentary trustees, and the Circuit Courts of Appeals which rendered the decisions in these cases held that the term "at the time of the distribution to the taxpayer", as used in § 113 (a) (5) of the applicable Act, refers to the time of delivery of such property to the taxpayer.

The decision of the Court below also conflicts in principle with that of the First Circuit Court of Appeals in *United States* v. *Van Nostrand*, 94 F. (2d) 510 (cited in the *Libbey* case, *supra*); with that of the Third Circuit Court of Appeals in *Haskell* v. *Commissioner*, 78 F. (2d) 869; and with the decisions of the Sixth Circuit Court of Appeals in *Williamson* v. *Commissioner*, 100 F. (2d) 735, and *Taft, Trustee* v. *Commissioner*, 101 F. (2d) 1007.

In the *Van Nostrand* case it was decided that the term "distribution" as used in § 113 (a) (5) of the Revenue Act of 1928 refers to actual delivery to the taxpayer. The *Haskell* case involved the question of the determination, under § 113 (a) (5) of the Revenue Act of 1928, of the amount of loss sustained by the taxpayer from the sale in 1930 of shares of stock acquired, as a legatee under a will, by general bequest. The *Williamson* case involved the determination, under § 113 (a) (5) of the Revenue Act of 1932, of the amount of gain from the sale in 1932 and 1933 of certain stocks which taxpayer had acquired from the estate of her husband, who died intestate. The *Taft* case involved the determination, under § 113 (a) (5) of the Revenue Act of 1928, of the amount of loss sustained from the sale in 1930 of securities by a testamentary trustee to whom the residue of an estate was bequeathed. In all these decisions, the Courts held that the term "distribution to the taxpayer" meant "delivery to the taxpayer."

II.

THE COURT BELOW ERRED IN CONSTRUING THE APPLICABLE STATUTE BECAUSE THE COURT FAILED TO RECOGNIZE THAT THE CONTROLLING WORDS IN THE STATUTORY PHRASE "AT THE TIME OF THE DISTRIBUTION TO THE TAXPAYER" ARE THE WORDS "TO THE TAXPAYER".

The conclusion of the Court below that Congress was not looking beyond the "distribution by the estate" of Gustavus F. Swift, the taxpayer's father (R. 71), and "did not intend the valuation date to go beyond the time when

the estate was closed" (R. 73), ignores the controlling words of the statute "at the time of the distribution to the taxpayer" as used in the third sentence of § 113 (a) (5) of the Revenue Act of 1928.

The meaning of the words "at the time" need not be defined. The words "to the taxpayer" are clear, definite, certain and unambiguous. The property involved was personal property which the taxpayer acquired by general bequest under the will of her father, Gustavus F. Swift.

In applying the statute, the first fact to be determined is the identity of the "taxpayer." The statute (§ 701 (a) (13) of the 1928 Act) provides that:

> "The term 'taxpayer' means any person subject to a tax imposed by this Act,"

whether that "person" be an individual, a trust, an estate, a partnership or a corporation. (§ 701 (a) (1).)

Ruth Swift Maguire is the "person" in this case who is "subject to a tax imposed by this Act." She is the person "ultimately liable for the tax itself". *Colorado National Bank of Denver* v. *Bedford*, 310 U. S. 41. The taxpayer's identity having been established, the plain language of the act eliminates from consideration any "time" except the "time" when the property was distributed to the taxpayer.

Haskell v. *Commissioner*, 78 F. (2d) 869, 870 (C. C. A. 3rd) (cert. den. 296 U. S. 652);

United States v. *Van Nostrand*, 94 F. (2d) 510, 512 (C. C. A. 1st);

Commissioner v. *Libbey*, 100 F. (2d) 458, 460, 461 (C. C. A. 1st);

Williamson v. *Commissioner*, 100 F. (2d) 735 (C. C. A. 6th) (cert. den. 307 U. S. 623);

Taft, Trustee, v. *Commissioner*, 101 F. (2d) 1007 (C. C. A. 6th);

Commissioner v. *Gambrill and Three Other Cases*, 112 F. (2d) 530 (C. C. A. 2nd).

III.

THE WORDS "DISTRIBUTION TO THE TAXPAYER" AS USED IN THE THIRD SENTENCE OF § 113 (a) (5) OF THE REVENUE ACT OF 1928 MEAN "DELIVERY TO THE TAXPAYER."

The word "distribution" was defined in *Willcuts* v. *Ordway*, 19 F. (2d) 917, 918 (C. C. A. 8th), as

> "separation and segregation from the trust estate so that it no longer forms any part or parcel thereof."

This Court, in speaking of the meaning of the word "distribution," as applied to dividends, held that the "date of payment, not the date of the declaration of the dividend, is the date of distribution." *Mason* v. *Routzahn*, 275 U. S. 175. To the same effect is *Lewellyn* v. *Harbison*, 31 F. (2d) 740 (cert. den. 280 U. S. 560), in which the Circuit Court of Appeals (3rd Circuit) held:

> "A distribution made is a completed act. • • • We agree with the Circuit Court of Appeals for the Sixth Circuit that a 'distribution made' means 'dividends paid' and not merely declared."

In every instance where the word "distribute" or the word "distribution" was used in the Revenue Act of 1928, it had reference to actual payment or delivery. (See Sections 112, 113 (a) (9), 115, 161, 162, 165, 167 and 182 of the Revenue Act of 1928.)

The word "distribution" was likewise used in the sense of actual payment or delivery in the Revenue Acts of 1926, 1924, 1921 and 1918.

It clearly appears from the decision of this Court in *Brewster* v. *Gage*, 280 U. S. 327, that the word "distribution," as used in § 113 (a) (5) of the Revenue Act of 1928, means delivery to the taxpayer of personal property acquired by intestacy or by general bequest. In its opinion (at page 334) this Court referred to the right of a legatee of such property "to have it delivered upon entry of the decree of distribution • • •.

The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs or legatees, and requires the administrators or executors to deliver it to them."

In the case of *McFeely* v. *Commissioner of Internal Revenue*, 296 U. S. 102 (with which five other cases[1] were decided), the Commissioner contended that the words "the time of the distribution to the taxpayer", as used in § 113 (a) (5) of the Revenue Act of 1928, meant the time of actual distribution to the taxpayer, and that until the date of such actual distribution, property could not be said to be held by the taxpayer under § 101 of the Revenue Act of 1928. It was not disputed in the *McFeely* case that the words "at the time of the distribution to the taxpayer," as used in the third sentence of § 113 (a) (5) of the 1928 Revenue Act, meant the date of actual distribution to the taxpayer.[2]

If, as held by the Court below, there was a distribution to the taxpayer, within the meaning of § 113 (a) (5) of the Revenue Act of 1928, when the Swift estate was closed in the Probate Court on December 11, 1905, then,

1. *First Nat. Bank of Boston, et al., Trustees under Will of Blodgett* v. *United States*, 76 F. (2d) 200 (C. C. A. 1st);
Lee v. *Commissioner of Internal Revenue*, 76 F. (2d) 203 (C. C. A. 1st);
Dibblee v. *Commissioner of Internal Revenue*, 75 F. (2d) 617 (C. C. A. 9th);
Rand v. *Helvering, Commissioner of Internal Revenue*, 79 F. (2d) 24 (C. C. A. 8th);
Ogle v. *Helvering, Commissioner of Internal Revenue*, 77 F. (2d) 338 (C. C. A. 2nd).

2. In deciding the McFeely case, the Supreme Court said:
"Here the rule obtains that a taxing statute, if of doubtful intent, should be construed favorably to the taxpayer: (Citing *Crooks* v. *Harrelson*, 282 U. S. 55, 61).
"To depart from the literal meaning of § 101 (c) (8) would be to penalize the taxpayer by lengthening the period during which the capital asset must be held in what is really a single ownership to obtain the advantage of the reduced tax. Under these circumstances we ought not to depart from the plain meaning of the section in an effort to bring about a uniformity which it is claimed Congress intended but failed to express."

during the period from January 1, 1916, to March 29, 1923, Ruth Swift Maguire would have been the taxpayer liable for the tax on *all* income derived from the property held in trust for her under the will of her father. *Such was not the case.* The testamentary trustees, themselves were the taxpayers as to income from such property during said period from January 1, 1916, to March 29, 1923, when actual distribution of the trust estate was made to Ruth Swift Maguire and her co-beneficiaries who were then surviving. During said period the revenue acts contained provisions expressly taxing to trustees income from any kind of property held in trust for future distribution under the terms of a will or trust.[3]

This being true, it could not also be true that "the time of the distribution to the taxpayer" of the properties involved herein was on December 11, 1905, when the estate of Gustavus F. Swift was closed in the Probate Court.

IV.

THE STATUTE IS CLEAR AND IS NOT AMBIGUOUS.

The Court below, in order to reach its decision, was forced to find that the express language of the statute "is not unambiguous and definite." (R. 70). In its opinion, the Court said:

> "The term 'distribution' might refer to distribution by the estate. *Jenkins* v. *Smith*, 21 F. Supp. 433; Dissenting opinion, *Commissioner* v. *Libbey*, 100 F. (2d) 458. Or it might refer to delivery by the testamentary trust. *Harbison* v. *Commissioner*, 26 B. T. A. 896; *Libbey* case, *supra*. In the light of the conflict of thought on this point, we are not con-

3. Sec. 2(b) of the Revenue Act of 1916;
First Trust and Savings Bank v. *Smietanka, Collector* (C. C. A. 7th), 268 F. 230, 233;
Merchants Loan and Trust Co., Trustee v. *Smietanka*, 255 U. S. 509.

vinced that the express language of the statute is unambiguous and definite, as counsel for taxpayer would have us believe."

This conclusion is contrary to and in direct conflict with every other authoritative construction of § 113 (a) (5) of the Revenue Act of 1928.

The First Circuit Court of Appeals, in the *Libbey* case, *supra*, said:

> "The meaning of the third clause of the statute is so plain that it does not call for construction, at least in its application to the facts of this case. 'Distribution to the taxpayer' means what it says—delivery to the taxpayer. It does not mean delivery by the executors to the trustees, where the trustees are not the taxpayer. They are not the taxpayer here."

The Second Circuit Court of Appeals, in the *Gambrill, Campbell, Knox* and *Rogers* cases, *supra*, said:

> "It is hard to imagine language which would more clearly fix the basis for computing the gain or loss realized upon the sales of the securities with which the Commissioner had to deal than the words 'fair market value of the property at the time of the distribution to the taxpayer.'"

The Third Circuit Court of Appeals, in *Haskell* v. *Commissioner*, 78 F. (2d) 869, said (at page 870):

> "The language of the statute is clear and requires no construction."

The Sixth Circuit Court of Appeals, in *Williamson* v. *Commissioner*, 100 F. (2d) 735, expressed no doubt as to the clarity of the language used when, in referring to the decision of the Board of Tax Appeals (34 B. T. A. 924), the Court said (at page 738):

> "Its determination that the date of the actual receipt of the stocks is the basis instead of the date of the order of distribution is in accord with the words of § 113 (a) (5), which expressly states that the basis shall be the 'fair market value of the property at the time of the distribution to the taxpayer.'".

On the basis of its decision in the *Williamson* case, the Sixth Circuit Court of Appeals affirmed the decision of the Board of Tax Appeals in *Taft, Trustee,* v. *Commissioner,* 101 F. (2d) 1007.

The decision of the United States District Court (Conn.) in *Jenkins, et al.* v. *Smith, Collector,* 21 F. Supp. 433, was destroyed as a precedent by the decision of the United States Circuit Court of Appeals, Second Circuit, on June 10, 1940, in the *Gambrill, Campbell, Knox* and *Rogers* cases, *supra.* Upon the appeal of *Jenkins* v. *Smith, supra,* the sole issue submitted to and decided by the Circuit Court of Appeals was that involving the service of notice and demand for tax by the Collector, such issue being referred to in the opinion of the District Court as Issue III. Inasmuch as the District Court decided that the plaintiffs, who were executors under the will of Jenkins, deceased, were entitled to recover the entire amount of the deficiency paid, for the reason that the Collector's demand and notice was not delivered to the taxpayer within ten days after receiving the assessment list, the remainder of the court's decision, holding that the word "distribution" in § 113 (a) (5) of the Revenue Act of 1932 referred to the distribution by executors to testamentary trustees and not to distribution by testamentary trustees, is dictum.

V.

THE PRINCIPLES OF STATUTORY CONSTRUCTION APPLICABLE TO THIS CASE ARE FIRMLY ESTABLISHED BY NUMEROUS DECISIONS OF THIS COURT.

In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used. It is well settled that where the language of a statute is clearly expressed there is no room for construction. *Helvering* v. *Gowran*, 302 U. S. 238, 241-242.

As this Court declared in deciding *Old Colony Railway Company* v. *Commissioner*, 284 U. S. 552, 560:

> "The rule which should be applied is established by many decisions. 'The legislature must be presumed to use words in their known and ordinary signification.' (*Levy* v. *M'Cartee*, 6 Pet. 102, 110) 'The popular or received import of words furnishes the general rule for the interpretation of public laws.' (Citing cases.) As was said in *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364, 370, * * * 'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.' This rule is applied to taxing acts; *DeGanay* v. *Lederer*, 250 U. S. 376, 381."

In *United States* v. *Merriam*, 263 U. S. 179, 187, this Court said:

> "But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government, and in favor of the taxpayer."

In *Crooks* v. *Harrelson*, 282 U. S. 55, this Court stated:

> "And there must be something to make plain the intent of Congress that the letter of the statute is

> not to prevail (citing *Treat* v. *White*, 181 U. S. 264). * * * Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with particular strictness".

In *Lucas, Commissioner* v. *Earl*, 281 U. S. 111, 114, this Court said:

> "But this case is not to be decided by attenuated subtleties. It turns on the import and reasonable construction of the taxing act."

The soundness of this established rule, in the construction of statutes levying taxes, is based upon the wide application of such statutes to large classes of citizens. If taxing statutes were to be construed by speculation, rather than by the plain import of the language used, the certainty of the revenue would be destroyed and the taxpayer forced to determine by litigation the meaning of ordinary language used by Congress. As this Court said in *White* v. *Aronson*, 302 U. S. 16, 21:

> "Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them."

Petitioner respectfully contends that the language of the applicable statute is "so plain as to need no construction". *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, 89. The intention of Congress is to be sought for primarily in the language used. *Thompson* v. *United States*, 246 U. S. 547, 551. Where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it. *Hamilton* v. *Rathbone*, 175 U. S. 414, 419.

The suggested ambiguity in the statute arises primarily through the failure of the Court below to give proper consideration and weight to the words "to the taxpayer", which are the vital part of the third sentence of § 113 (a) (5) of the Revenue Act of 1928 (Point II herein). When the phrase "distribution to the taxpayer" is considered

as a whole, it is obvious that the "distribution" to which Congress referred was the delivery of the property involved to the person who sold it and to whom the gain on such sale was to be taxed.

VI.

THE LEGISLATIVE HISTORY RELATING TO THE ENACTMENT OF § 113 OF THE REVENUE ACT OF 1928 SUSTAINS THE POSITION OF THE TAXPAYER.

The opinion of the Court below points out (R. 71) that the change in the basis date for determining gain or loss from the sale of property passing by will or intestacy, as provided in § 113 of the Revenue Act of 1928, was due to confusion as to the meaning of the term "date of acquisition" of such property by the taxpayer, which basis was prescribed by the prior Revenue Acts. Such confusion was ended by the decision of this Court in *Brewster* v. *Gage*, 280 U. S. 327, rendered January 6, 1930, affirming the decision of the Circuit Court of Appeals (2nd Circuit) on February 4, 1929, 30 F. (2d) 604.

Brewster v. *Gage, supra,* was an action brought to recover income taxes alleged to have been erroneously and illegally collected for the years 1920, 1921 and 1922. In that case the Circuit Court of Appeals (2nd Circuit) had held that the Revenue Acts of 1918 and 1921[4] should not be construed so as to render untaxable gain which had accrued during the period between the date of the death of the testator and the date of distribution to a residuary legatee, and said that if the basis for determining gain or loss on the sale of personal property acquired by general bequest or intestacy was its fair market value at the date of distribution, "that would place it within the power of

4. The Revenue Acts of 1918 (40 Stat. at L. 1057, c. 18) and 1921 (42 Stat. at L. 227, c. 136), which were applicable for the years 1920 to 1922, inclusive, provided that if the property was acquired by bequest, devise or inheritance, the basis should be the fair market value of such property at the time of such acquisition.

personal representatives and the real owners, namely, the legatees or distributees, to defer distribution in order to escape tax".

The Circuit Court of Appeals (2nd) further held (at p. 605) that the date of *acquisition* did not mean the date of *distribution,* because "It surely was not the intent of Congress that the acquisition of a mere legal title should completely wipe out or render untaxable the gain which had been acquired by the equitable ownership, and which was, in fact, realized upon the sale when the date of distribution arrived". In affirming the decision of the Circuit Court of Appeals (2nd Circuit) in *Brewster* v. *Gage, supra,* this Court pointed out that the Revenue Act of 1928, § 113 (a) (5), "expressly established value at the time of the death of the decedent as the basis of calculation in respect of sales of personal property acquired by specific bequest and of real estate acquired by general or specific devise or by intestacy, and in all other cases fixed fair market value at the time of distribution to the taxpayer as the basis. 45 Stat. at L. 819, chap. 852, U. S. C. title 26, § 2113. The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended." References in House Report No. 704[5] and in Senate Report No. 558[6] to the decision of this Court in *Brewster* v. *Gage, supra,* show that Congress, had full knowledge of such decision when, on June 6, 1932, it re-enacted without change said § 113 (a) (5) of the Revenue Act of 1928, which fixed the basis of personal property acquired by general bequest or inheritance as its fair market value at the time of the distribution to the taxpayer.

In recommending the re-enactment in 1934 of the provision contained in the 1926 Act, which fixed value at

5. 73rd Cong., 2nd Sess., Int. Rev., Cum. Bul. 1939-1 (Part 2) pp. 554, 575.
6. 73rd Cong., 2nd Sess., Int. Rev., Cum. Bul. 1939-1 (Part 2) pp. 586, 612.

"the date of acquisition" as the basis, both the House and the Senate Committees said:

> "the change in the 1928 Act was made because there was some doubt as to the meaning of the term 'date of acquisition', which was the term used under the Revenue Act of 1926";

and that since the 1928 Act was passed, the Supreme Court had defined the term "date of acquisition" to mean the date of death in the case of all property passing by bequest, devise and inheritance, whether real or personal. The Committees then recommended that § 113 (a) (5) of the 1934 Bill should conform to the language contained in the 1926 Act, so that a uniform basis rule might be required in the case of property passing at death, whether real or personal.

It is seen that the change in the 1934 Act was not made because "some evils had appeared", as stated by the Court below (R. 72), but because all doubt as to the meaning of the words "date of acquisition" had been removed by the decision of this Court in *Brewster* v. *Gage, supra.*

Convincing proof that Congress, by the third sentence of § 113 (a) (5) of the 1928 and 1932 Revenue Acts, did not intend to tax all increment in value is found in the provision that the basis for determining gain or loss on the sale of personal property acquired by general bequest or intestacy is the value thereof "at the time of the distribution to the taxpayer", since the date of distribution must be subsequent to the death of the decedent. Concerning this, there is no dispute, but Respondent contends that Congress must have intended that only a minimum amount of increment should escape taxation and that, therefore, the word "distribution", as used in § 113 (a) (5) of the 1928 Revenue Act, should be construed to mean something different than it means in every other section of the Act.

The Court below accepted such contention, because (as the Court said) the Senate Finance Committee, in recommending enactment of the Revenue Act of 1934 (Senate Report No. 558[7]), expressed no concern over a construction of the word "distribution" which would permit "avoidance of tax gains accruing between death and distribution by the trustee" to the taxpayer. The Court concluded, therefore, that Congress, in enacting the 1928 and 1932 Revenue Acts, did not look beyond the "distribution by the estate" (R. 73).

At the time Congress was considering the enactment of the Revenue Act of 1934, the Commissioner of Internal Revenue was holding that the term "at the time of the distribution to the taxpayer", in the case of distribution by a testamentary trust, meant at the time of the delivery to the taxpayer.

House Report No. 704, *supra*, was made on February 12, 1934. On August 29, 1932, the United States Board of Tax Appeals, in construing § 113 (*a*) (5) of the Revenue Act of 1928, had held that the term "at the time of the distribution to the taxpayer" meant at the time of the delivery to the taxpayer (*Ralph W. Harbison* v. *Commissioner*, 26 B. T. A. 896). The decision of the Board of Tax Appeals in the *Harbison* case was acquiesced in by the Commissioner of Internal Revenue in 1933 (G. C. M. 11309, Internal Revenue, C. B. XII-1, 126), *and it was not until 1935* that the Commissioner withdrew such acquiescence and issued General Counsel's Memorandum 14893 (Internal Revenue, C. B. XIV-1, 202), which asserted that the term "at the time of the distribution to the taxpayer", as used in the 1928 and 1932 Revenue Acts, meant "at the time of the distribution from the estate".

It is entirely illogical to reason that the members of the

7. 73rd Cong., 2nd Sess., Int. Rev., Cum. Bul. 1939-1 (Part 2) pp. 586, 612.

Congressional Committees, when considering the proposed 1934 Revenue Act, were unaware of the administrative rulings of the Commissioner in force at the time, which permitted the escape from taxation of the increment in value accruing between the date of the closing of an estate and the date of the delivery to the taxpayer. Nevertheless, the Court below concluded that Congress, at the time of enacting the 1934 Revenue Act, was unaware that the word "distribution" refers to "delivery" and that, therefore, in enacting the Revenue Acts of 1928 and 1932, "Congress was not looking beyond the distribution by the estate, when it wrote the language in controversy" (R. 73).

The conclusion of the Court below is not drawn from anything that the legislators said, but is drawn wholly from the failure of the Congressional Committees to refer to their undoubted knowledge of the administrative rulings of the Commissioner. Such conclusion demonstrates the fallacy of statutory construction by speculation rather than by the clear import of the language used.

VII.

PROPERTY PURCHASED BY TESTAMENTARY TRUSTEES AND DISTRIBUTED TO THE TAXPAYER WAS ACQUIRED BY THE TAXPAYER BY WILL.

The Court below held, in effect, that the property *purchased by the executors* under the will of Gustavus F. Swift and turned over to themselves as testamentary trustees, and which was later delivered in kind to the taxpayer and her co-beneficiaries, was "property transmitted at death" and "acquired by will" (R. 72, 73); but that the property *purchased by the testamentary trustees* and distributed to said beneficiaries was not "property transmitted at death * * * that it was acquired by purchase and not 'by will'" (R. 74).

Beginning with the 1916 Revenue Act, Congress has uniformly treated executors and trustees as fiduciaries, and there is nothing whatever in the language of the Revenue Act of 1928, or in the Congressional Reports relating to any Revenue Act, which indicates that Congress intended to discriminate between such fiduciaries. Congress, when passing the Revenue Act of 1928, construed the third sentence of § 113 (a) (5) as applying in cases where the executor purchases property and distributes it to a beneficiary. It inevitably follows that Congress intended that the third sentence of said section should also apply in cases where testamentary trustees purchase property and distribute it to a beneficiary.

The Senate Finance Committee, in its report No. 960[8] upon the Revenue Bill of 1928, stated:

> "the House Bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property."

The Senate Finance Committee, therefore, revised § 113 (a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty or the transmission of realty by intestacy, the basis should be the fair market value at the time of the death of the decedent and stated:

> "The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific

8. 70th Cong., 1st Sess., Int. Rev., Cum. Bul. 1939-1 (Part 2) pp. 409, 427.

bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary."

The Conference Committee, in its report upon the Revenue Bill of 1928 (Report No. 1882[9]), adopted the Senate Finance Committee's revision of § 113 (a) (5).

The Court below placed undue emphasis upon the words "Property Transmitted at Death" which are a subheading of § 113 (a) of the 1928 Revenue Act, relating to personal property acquired by specific bequest or intestacy, real property acquired by general or specific devise, and to "all other cases if the property was acquired either by will or by intestacy." But the title of an act cannot limit the plain meaning of its text. *Strathearn S. S. Co.* v. *Dillon,* 252 U. S. 348, 354. As stated by this Court in *Caminetti* v. *United States,* 242 U. S. 470, 490:

> "* * * the name given to an act by way of designation or description or the report which accompanies it, cannot change the plain import of its words. If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.
>
> "Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation. But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to, or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd, or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent."

9. 70th Cong., 1st Sess., Int. Rev., Cum. Bul. 1939-1 (Part 2) pp. 444, 447.

The question is whether the property involved herein was "acquired by will". In the case of *Fleming* v. *Commissioner*, 36 B. T. A. 773, the contention of the Commissioner of Internal Revenue that securities purchased by testamentary trustees and by them distributed to residuary legatees under a will was property "acquired by will" was sustained. The Board of Tax Appeals said (at page 777):

> "It may well be that these securities were purchased by the testamentary trust, and that the title to them was then acquired by petitioner, remainderman. (Citations) However, our immediately pertinent question is not *when* but *how* the petitioner, remainderman under the will of her father, not the trustee, acquired these securities. * * * the testamentary trustee was not the agent of petitioner, the remainderman. The trustee was the creature of the decedent, made so by his will. It was thus designated as the continuing instrumentality of the decedent to execute his and not the will of the petitioner, remainderman. She neither controlled the terms of the trust nor its *res* until distributed to her. All she had before that distribution was a right to share therein in accordance with the terms of the testamentary trust, the right to which vested in her at the death of decedent. (Citations) Thus, it was by virtue of the provisions of the testamentary trust created by the will of her father, that petitioner was the remainderman under that trust and received the securities in question. They may have been purchased by the trustee, but the petitioner acquired them by will."

In the case of *Commissioner* v. *Gambrill, supra,* the United States Circuit Court of Appeals (2nd Circuit) held (at page 533) that any property distributed by a testamentary trustee, which is part of the corpus of the trust, "is acquired through and by virtue of the will. Through the will the remaindermen derived all their interests and without it they would have had no standing and would have received nothing." The Court cited *Lyeth* v. *Hoey,*

305 U. S. 188, where this Court held that the value of property received by an heir from the estate of a decedent, in compromise of his claim that the decedent's will was invalid, was property acquired by inheritance within the meaning of the Federal income tax law.

In the case of *Richard J. Reynolds* v. *Commissioner of Internal Revenue,* decided October 7, 1940, by the United States Circuit Court of Appeals (4th Circuit), the Court held that securities purchased by a testamentary trustee under the will of R. J. Reynolds, taxpayer's father, and by said trustee distributed to the taxpayer, Richard J. Reynolds, constituted property "acquired by bequest, devise or inheritance" within the meaning of § 113 (a) (5) of the Act of 1934. In so deciding, the Court stated:

> "In our opinion, § 113 (a) (5) of the Act covers securities purchased by the trustee in the administration of the estate and distributed to the taxpayer, as well as securities received by the trustee from the decedent's estate and similarly distributed. Obviously, the will of R. J. Reynolds was the source of the taxpayer's acquisition in both cases. We are in accord with the views expressed upon a similar question under the Revenue Act of 1928 in *Commissioner* v. *Gambrill,* 2 Cir., 112 F. 2d 530, 533."

The undisputed and controlling fact in this case is that the property here involved was acquired by the taxpayer, Ruth Swift Maguire, "through and by virtue of the will" of Gustavus F. Swift. *Commissioner* v. *Gambrill, supra.* Ruth Swift Maguire and her co-beneficiaries under their father's will did not purchase any of the securities involved in this case. The title of taxpayer and her co-beneficiaries to such securities rests entirely in their father's will. Having thus acquired by will the securities purchased by the testamentary trustees and distributed to the taxpayer, the basis for computing taxpayer's gain upon the sale by her of such securities is "the fair market

value of the property at the time of the distribution to the taxpayer'' on March 29, 1923.

CONCLUSION.

The property involved in this case was personal property ''acquired by will'' by general bequest. It was distributed to the taxpayer, Ruth Swift Maguire, on March 29, 1923, and was sold by her in 1929 and 1930. The proper basis for determining taxpayer's gain, for income tax purposes, on the sale of such property, is the fair market value thereof on March 29, 1923, which was ''the time of the distribution to the taxpayer.'' The decision of the United States Circuit Court of Appeals (7th Circuit) should be reversed.

Respectfully submitted,

ALBERT H. VEEDER,
FRANCIS E. BALDWIN,
33 South Clark Street,
Chicago, Illinois,
Attorneys for Petitioners.

APPENDIX.

APPLICABLE STATUTE.

Revenue Act of 1928, c. 852, 45 Stat. at L. 791:

SEC. 111. *Determination of Amount of Gain or Loss.*

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

SEC. 113. *Basis for Determining Gain or Loss.*

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * *

(5) *Property Transmitted at Death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death;

(b) *Property acquired before March 1, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be:

(1) the cost of such property (or, in the case of such

property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided), or

(2) the fair market value of such property as of March 1, 1913, which ever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

SEC. 701. *Definitions.*

(a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

* * * * * *

(13) The term "taxpayer" means any person subject to a tax imposed by this Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 346

JEREMIAH D. MAGUIRE AND RUTH S. MAGUIRE,
Petitioners,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

ALBERT H. VEEDER,
FRANCIS E. BALDWIN,
33 South Clark Street,
Chicago, Illinois,
Counsel for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

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No. 346.

JEREMIAH D. MAGUIRE AND RUTH S. MAGUIRE,
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vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR THE PETITIONERS.

QUESTIONS PRESENTED.

The Commissioner correctly states that, pursuant to a testamentary trust established under the will of the father of the petitioner,[1] her share of certain personal property was distributed to her twenty years after her father's death; that she thus received not only securities formerly owned by the decedent but also other securities purchased by the trustees under the authority "to make investments • • • and change the same in their discretion" contained in paragraph 3 of the will of petitioner's father

1. Petitioners are husband and wife who filed a joint return (R. 3). The income involved is that of Ruth Swift Maguire. The word "taxpayer" or the word "petitioner", wherever used in this brief, is intended to mean Ruth Swift Maguire, unless the context indicates otherwise.

(R. 23). During the year 1930 she sold securities of both groups, and the questions presented relate to the proper basis for determining gain or loss upon these sales, namely:

(1). Whether, under Section 113 (a) (5) of the Revenue Act of 1928, the basis of the first group of securities is their value when received by the trustees from the decedent's estate, or their value at the date of distribution by the trustees to petitioner, who is the taxpayer; and

(2) Whether the basis of the second group of securities is their cost to the trustees or their value at the date of distribution (Br. 2-3).

STATUTES INVOLVED.

The statutes involved are set forth in the Appendix, *infra*, pages 19 to 20.

SUMMARY OF ARGUMENT.

I.

The taxpayer, as a residuary legatee, acquired by will by general bequest all of the property sold by her, and the basis for determining her gain from the sale of such property is its value "at the time of the distribution to the taxpayer."

II.

Property purchased by the testamentary trustees and distributed to the taxpayer was acquired by will, and its basis is the fair market value "at the time of the distribution to the taxpayer."

GENERAL STATEMENT.

The argument of the Commissioner is directed toward the following conclusions:

(1) That the term "time of the distribution to the taxpayer", as used in the applicable statute, should be construed to mean "time of the distribution from the estate"; and

(2) That property passing to the beneficiaries of a testamentary trust, if purchased by the testamentary trustees, is not "acquired by will".

Such argument is based upon the theory that the history of the provisions relating to the basis for property acquired "by gift or inheritance" reveals a "general plan" to leave the value of such property, as of the date of gift or of the decedent's death, free from income tax in the beneficiary's hands and to use that value as the beneficiary's

basis for determining gain or loss on a subsequent disposition (Br. 6). The Commissioner recognizes that Sections 113 (a) (5) of the Revenue Acts of 1928 and 1932, which sections were identical, constitute "a legislative departure" from the "scheme" above mentioned, which "immunizes from tax effect" gains or losses accruing after the date of death and before distribution to the taxpayer (Br. 16). This admission by the Commissioner is compelled by the provisions of the 1928 and 1932 Revenue Acts.

The Commissioner nevertheless asserts that Congress "could not have intended a material departure" from the general plan (Br. 16), and that the "legislative purpose" is observed by construing the words "the time of the distribution to the taxpayer" as contemplating the time when the estate is closed and distribution is made out of the estate (Br. 7). Such construction requires that an implied meaning be attached to the words of the statute which is quite contrary to their known and ordinary signification. As stated in Petitioners' Original Brief, p. 13, the words "at the time" need no construction; the word "taxpayer" is defined as the person subject to the tax imposed by the Act. The taxpayer's identity having been established, the plain language of the Act eliminates from consideration any time except the time of the actual "distribution to the taxpayer".

The construction sought by the Commissioner requires a further conclusion, namely, that subdivision (5) of Section 113 (a) of the Revenue Act of 1928, dealing with property acquired by will, does not cover property which was purchased by testamentary trustees following the decedent's death and distributed to the beneficiaries of a testamentary trust established by the will (Br. 7). The Commissioner admits that if such property is held to be "acquired by will", the basis is found in Section 113 (a) (5) of the Revenue Act of 1928 and that such basis is the value of such property "at the time of the distribution to the tax-

payer". Since the distribution from the estate occurred, in the instant case, on December 11, 1905, property purchased by testamentary trustees subsequent to that date and distributed to the taxpayer on March 29, 1923, must take as a basis the value at March 29, 1923, if "acquired by will"; and it follows that in respect to such property the term "at the time of the distribution to the taxpayer", as used in the applicable statute, necessarily refers to the time of the distribution by the testamentary trustees (who purchased the property) and not to the time of the distribution from the estate.

The Commissioner is forced to admit that property purchased by executors or administrators of an estate is "acquired by will" (Br. 8, 29), but argues that there is no reason to "extend the construction by implication". In deciding this case, it is not necessary to extend by implication the construction of the phrase "acquired by will", because that term clearly refers to property acquired by a beneficiary under a will, whether that beneficiary be a legatee taking by specific bequest or by general bequest, or a beneficiary of a testamentary trust. Although the identical property was not held by the decedent in his lifetime, it was "acquired by will" if either the decedent's executors or his testamentary trustees purchased the property and distributed it to a residuary legatee.

ARGUMENT.

I.

The Taxpayer, As a Residuary Legatee, Acquired By Will By General Bequest All of the Property Sold By Her, and the Basis For Determining Her Gain From the Sale of Such Property Is Its Value "At the Time of the Distribution to the Taxpayer".

In respect to property owned by decedent in his lifetime and passing to the taxpayer by general bequest, the Commissioner argues (Br. 16-26) that the basis for such property is its value when distributed by the executor of the decedent's estate to testamentary trustees. It is agreed (Br. 17) that if the property had been sold by the testamentary trustees their basis would have been the value at the date of distribution by the executors, because in such case the testamentary trustees would have been the "taxpayers" referred to by the Act, and the Act prescribes the basis of such property as the value "at the time of the distribution to the taxpayer".

The Commissioner also asserts that the petitioner urges that " 'the time of the distribution to the taxpayer' referred to in the statute shifts from the date of distribution by the executors to the date of distribution by the trustees, if the latter distribute in kind, or perhaps that there are two times of distribution" (Br. 17).

Petitioner has not at any time urged that "the time of the distribution to the taxpayer" shifts from the date of distribution by the executors to the date of distribution by the trustees. On the contrary, taxpayer asserts that within the meaning of the statute *there was but one distribution to her* of the property involved in this case and

that such distribution occurred on March 29, 1923, when the property involved herein was delivered to the taxpayer.

In answer to petitioner's contention that the word "taxpayer" in the term "the time of the distribution to the taxpayer" can refer only to the person to whom the testamentary trustees delivered the property, the Commissioner contends that " 'the time of the distribution' is the date of distribution by the executors and that it so remains whether or not the testamentary trustees sell the property or distribute it in kind. * * * the word 'taxpayer' refers to the person or other taxable entity to whom the property is distributed upon termination of the administration of the decedent's estate" (Br. 18). In substance, the Commissioner's contention is that the language of Section 113 (a) (5) is ambiguous.

It is respectfully submitted that this construction of the statute has been refuted in the decisions of various United States Circuit Courts of Appeals cited below, which have held that the statute is clear and is unambiguous.

Commissioner of Internal Revenue v. *Libbey*, 100 F. (2d) 458 (C. C. A. 1st).

Commissioner of Internal Revenue v. *Gambrill* and related cases, 112 F. (2d) 530 (C. C. A. 2nd).

Haskell v. *Commissioner*, 78 F. (2d) 869 (C. C. A. 3rd).

Williamson v. *Commissioner*, 100 F. (2d) 735 (C. C. A. 6th).

In all of these cases, decisions of the United States Board of Tax Appeals were affirmed.

In *United States* v. *Van Nostrand*, 94 F. (2d) 510, the First Circuit Court of Appeals said (at page 512):

> "Congress, in its wisdom, in the last clause of Section 113 (a) (5), fixed as the cost basis for securities sold by the taxpayer the market value of them 'at the time of the distribution to the taxpayer'—in other words the time of delivery of the securities to him."

This Court in *Browder* v. *United States* (decided February 17, 1941) said in substance that "No single argument has more weight in statutory interpretation" than the plain meaning of the words of an act. Where, as in this case, the words of the statute are clear and unambiguous, the court "must apply the statute" as it finds it, "leaving to Congress the correction of asserted inconsistencies and inequalities in its operation". *McClain* v. *Commissioner*, U. S. Sup. Ct., Jan. 6, 1941.

The words of the statute are clear and unambiguous. Such a statute will be given effect as written. *Helvering* v. *Wood*, 309 U. S. 344 (1940); *Deputy* v. *duPont*, 308 U. S. 488 (1940).

In *Deputy* v. *duPont*, *supra*, this Court said (at page 497):

> "In *Old Colony R. Co.* v. *Commissioner of Internal Revenue*, 284 U. S. 552, this Court had before it the meaning of the word 'interest' as used in the comparable provision of the 1921 Act. It said, p. 560, 'as respects interest the usual import of the term is the amount which one has contracted to pay for the use of borrowed money'. It there rejected the contention that it meant 'effective interest' within the theory of accounting or that 'Congress used the word having in mind any concept other than the usual, ordinary and everyday meaning of the term'. It refused 'to assume that the Congress used the term with reference to 'some esoteric concept derived from subtle and theoretic analysis'. We likewise refuse to make that assumption here. * * * In sum, we cannot sacrifice the 'plain, obvious and rational meaning' of the statute even for 'the exigency of a hard case' " (citing *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364, 370)[2].

The Commissioner attempts to support his contention that Section 113 (a) (5) of the Revenue Act of 1928 is am-

2. The complete quotation of the language used by this Court in *Lynch* v. *Alworth-Stephens Co.*, is: "And the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover".

biguous by the fact that under the plain language of the Act the increment in value of property while in the hands of testamentary trustees escapes taxation if sold after distribution to the beneficiaries of the trust (Br. 18). The Commissioner admits that the increment in value of property while in the hands of the executors of an estate escapes taxation if sold after distribution, but asserts that because the Senate Committee Report on the 1934 Act [3] fails to refer to the "much more sizeable loophole", the Senate Committee was unaware of a construction of the statute which would permit increment in value of property in the hands of testamentary trustees to escape tax (Br. 19). Yet the Commissioner admits (Br. 25) that in 1934, when the Senate Committee rendered its report, the published rulings of the Commissioner [4] held that the term "time of the distribution to the taxpayer" referred to the date of delivery.

The Commissioner asserts (Br. 23) that the committee reports on the 1928 Act show a preoccupation with the decedent's death, or the administration of his estate, and not with subsequent transmissions of property. It is submitted that the statements in the Conference Report of the 1928 Act show, instead, a preoccupation with the removal of confusion in the existing law, which fixed "fair market value at the time of acquisition" as the basis. The primary concern of Congress was to enact a clear and unambiguous statute by substituting for the ambiguous term "time of acquisition" the clear and unambiguous language "time of the distribution to the taxpayer". Such language has an ordinary and known significance, whether the distribution be by executors or administrators, or by testamentary trustees, or by any other person. The controlling words in the statute are "to the taxpayer".

3. Senate Report No. 558, 73rd Cong., 2nd Sess., Int. Rev. Cum. Bul. 1939-1 (Part 2) pp. 586, 612.

4. General Counsel's Memorandum 11309, Int. Rev. Cum. Bul. XII-1, p. 126 (1933).

The Commissioner argues (Br. 24) that petitioner's construction of the statute, which is based on the plain language, gives a strange effect to Section 113 (b) "which is intended to exempt from tax accruals in value before, and not after, March 1, 1913". Such effect, in the opinion of the Commissioner, is caused by the necessity of comparison between 1913 value and 1923 value. But the Commissioner admits that, in the case of a decedent dying before March 1, 1913, the distribution might occur "not long after March 1, 1913", in which case the comparison required by the statute is still between 1913 and a date subsequent to 1913; thus the "strange effect" is one of degree only, not of principle.

The Commissioner asserts that the taxpayer's contention that the decision below conflicts in principle with the *Haskell, Williamson* and *Taft* cases is not well founded (Br. 26). In each of said cases, the term "at the time of the distribution to the taxpayer" was held to mean "at the time of the delivery to the taxpayer".

II.

Property Purchased By the Testamentary Trustees and Distributed to the Taxpayer Was Acquired By Will and Its Basis Is the Fair Market Value "At the Time of the Distribution to the Taxpayer"

In subdivision II of his brief, the Commissioner contends that within the meaning of Section 113 (a) (5) of the Revenue Acts of 1928 and 1932, property purchased by the testamentary trustees under the Swift will and distributed by them to the taxpayer was not acquired by the taxpayer by will; and that under these circumstances the basis of such property to the beneficiary is the fiduciary's cost (Br. 26-39).

The Commissioner experiences great difficulty in distin-

guishing between the distribution of personal property purchased by executors and the distribution of personal property purchased by testamentary trustees. In respect to the former, he is forced to concede that such property was "acquired by will", in view of the specific language found in the Congressional reports. However, he finally bases such distinction on the theory that "it is possible to consider that until distribution by the decedent's estate, basic testamentary disposition is in suspense; and that for tax purposes acquisition of personal property passing by general bequest or intestacy does not occur until that distribution is made. In this light property purchased by the executor prior to that distribution is acquired by the distributee by will, as though the testator (in whose stead the executor is acting) had himself made the purchase and passed the property on under his will. But once the administration is completed * * *, the basic testamentary disposition has been effected" (Br. 31-32).

The statute does not deal with a "basic testamentary disposition". In this case the court is construing and applying the statutory words "time of the distribution to the taxpayer". If the property held by the executors under the Swift will was in "suspense" until it was delivered to the trustees, it was in "suspense" until it was distributed to the taxpayer; but such "suspense" cannot affect the plain meaning of the statutory words "time of the distribution to the taxpayer".

While the Commissioner refers to the executor of an estate acting in the stead of the decedent, it is well recognized that testamentary trustees are also the creature of the decedent, made so by his will.

In the case of *Margaret E. B. Fleming*, 36 B. T. A. 773, the Commissioner took a position precisely opposite to that which he is taking here. He opposed the taxpayer's contention that the basis of stock which had been purchased and distributed by the testamentary trustee was "cost"

to the trustee; and the Commissioner requested the Board to hold and the Board found that the third sentence of Section 113 (a) (5) of the Revenue Act of 1928 was applicable.

This Court, in *Brewster* v. *Gage*, 280 U. S. 327, held that Congress, in the Revenue Act of 1928, intended the term "time of acquisition", in the case of personal property passing by general bequest or intestacy, to refer to the date of the death of the decedent. Further, Congress, in enacting the Revenue Act of 1928, was concerned with eliminating the confusion arising from conflicting constructions as to the meaning of the term "time of acquisition" and carefully avoided value at the time of acquisition as the basis for such property. The phrase "acquired by will" refers to the manner of acquisition, and not to the time.

In the course of the enactment of Section 113 (a) (5) of the 1928 Act, the House added to the section, while the bill was before the Conference Committee, a fourth sentence which provides as follows:

> "In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death".[5]

Paraphrased, this sentence provides that where the grantor of a revocable trust dies without having revoked the trust, the basis of the property in the hands of persons entitled thereto shall be the same as if the trust instrument were a will. Therefore, property passing to the beneficiary of such trust is property acquired "by bequest or devise". Such property, whether originally transferred to the trustee by the grantor of such trust or purchased by the trus-

5. Conference Committee Report No. 1882, 70th Cong., 1st Sess., Int. Rev. Cum. Bul. 1939-1 (Part 2) pp. 444, 447.

tees during the term of the trust, is property "acquired by will".

The Conference Report describes the scope of the above-quoted provision as follows:

> "A special rule is provided in section 113 (a) (5) by which to determine the basis of property transferred in trust with the right reserved to the grantor at all times prior to his death to revoke the trust where the sale or other disposition of property occurs after the death of the grantor. *This rule includes sales or other dispositions by the trustee and also by a beneficiary of the trust*".[6] (Italics supplied.)

Under this provision, therefore, such a revocable trust is to be treated as a will when the grantor dies without having revoked the trust. Since said rule includes sales by the beneficiary of a revocable trust, which, under the statute, is treated as a testamentary trust, it inevitably follows that said rule applies to sales by beneficiaries of a testamentary trust contained in a will. The statements in the Conference Report of the 1928 Act show that Congress was aware of the problem of sales by the beneficiary of a testamentary trust and was not merely concerned with the problem of sales by an executor or by a legatee or devisee of a will which contained no trust provisions.

The basis of distribution from executors to trustees, which the Commissioner contends is applicable to personal property acquired by general bequest, cannot be applied to personal property passing under such revocable trust, because there is "no transfer from executor to trustee". There is only one fiduciary, and, under the 1928 and 1932 Revenue Acts, only the date of delivery to the beneficiary of such revocable trust can be used as the beneficiary's basis. The provisions of the 1928 and 1932 Acts are identical with the provisions of the 1934 Act.

The regulations issued under the 1928 Act (Regulations 74, Art. 596), relating to purchases by a trustee of a revo-

6. Conference Committee Report No. 1882, 70th Cong., 1st Sess., Int. Rev. Cum. Bul. 1939-1 (Part 2) pp. 444, 447.

cable trust which is treated as a will, are substantially similar to the regulations issued under the 1932 Act (Regulations 77, Art. 596). *Paul & Mertens Law of Federal Income Taxation,* Vol 2 § 18.101, pp. 363-4. Section 113 (a) (5) of the Revenue Acts of 1934, 1936, 1938, and Section 113 (a) (5) of the Internal Revenue Code relate to property transmitted at death, and all of such regulations appear under the heading "Basis of Property Acquired by Bequest, Devise, or Inheritance".

Inasmuch as property purchased by a trustee under an unrevoked revocable trust has been thus consistently treated as property acquired by bequest, devise or inheritance, it follows that property purchased by testamentary trustees and distributed to beneficiaries was acquired by the beneficiaries "by will".

The Commissioner asserts that under the Revenue Acts of 1926 and before, and 1934 and thereafter, a number of Circuit Courts of Appeals have held that a remainderman who takes property following a testamentary trust should be taxed "on the increments in the value of the property accruing" after the date of the decedent's death (Br. 34). The Commissioner then argues that "If these decisions are correct, it cannot reasonably be concluded that that property 'acquired by bequest, devise, or inheritance' includes property purchased by testamentary trustees. For if it did, time of acquisition would necessarily refer either to the date of purchase by the trustees, or the date of termination of the trust and transfer of the property by the trustees to the beneficiary" (Br. 35).

The correctness of the holding of the decisions relating to the Revenue Acts of 1926 and before, and of 1934 and thereafter, is not questioned, because those Revenue Acts fix the basis in all cases of property acquired by bequest, devise, or inheritance as its fair market value "at the time of acquisition". Under those Acts, it was correctly decided

that the basis of property purchased by a testamentary trustee and distributed to a beneficiary of the testamentary trust was cost. This merely meant that in such cases "cost" was the equivalent of fair market value of the property at the time of acquisition, which is self-evident.

It is significant that notwithstanding the Commissioner's argument that the term "property acquired by bequest, devise, or inheritance", found in all of the Revenue Acts except those of 1928 and 1932, does not apply to property purchased by testamentary trustees, the 1934 and all subsequent regulations relating to such purchases by testamentary trustees have been placed under the heading "Basis of Property Acquired by Bequest, Devise, or Inheritance".

The Commissioner also argues that "there is no reason to believe that Congress intended to leave out of tax account advantages or disadvantages inhering in the purchase itself" (Br. 35).

Congress re-enacted in 1932 Section 113 (a) (5) of the Revenue Act of 1928, thus leaving in effect the provision of the 1928 Act that the basis in the hands of a distributee of personal property acquired by general bequest or intestacy should be "the fair market value of the property at the time of the distribution to the taxpayer".

In the decision of the United States Circuit Court of Appeals (2nd Circuit) in *Brewster* v. *Gage*, which was rendered February 4, 1929 (30 F. (2d) 604), the court held that if the "date of acquisition" meant the "time of distribution", gains accruing between the date of a decedent's death and the time of distribution to the taxpayer of personal property acquired by intestacy, or by general or residuary bequest, would escape taxation. The court said (at page 605):

> "It surely was not the intent of Congress that the acquisition of a mere legal title should completely wipe out or render untaxable the gain which had been

> acquired by the equitable ownership, and which was in fact, realized upon the sale made when the date of distribution arrived. Moreover, it would be an unfortunate construction, which is not demanded by the statute, that would place it within the power of personal representatives and the real owners, namely, the legatees or distributees, to defer distribution in order to escape tax. This should be avoided."

Congress must have been aware of the decision of the Circuit Court of Appeals (2nd Circuit) in *Brewster* v. *Gage* and its affirmance by the Supreme Court on January 6, 1930 (280 U. S. 327), when it re-enacted in 1932 Section 113 (a) (5) of the Revenue Act of 1928, and must have known that to fix value at date of distribution of personal property acquired by general bequest under a will might allow gain accruing prior to distribution to escape taxation. It is reasonable to conclude that notwithstanding such possibility, Congress deemed it wise and proper to re-enact Section 113 (a) (5) of the 1928 Act.

The Commissioner submits that the provision relating to property acquired by bequest, devise, or inheritance, found in all of the acts except those of 1928 and 1932, does not apply to purchases by testamentary trustees; that property so purchased is acquired by the beneficiary by purchase and the legatee's basis therefor is the trustees' cost. The Commissioner states that "Since 1934 the Treasury Regulations have expressly so provided" (citing Article 113 (a) (5)-1(d) of Treasury Regulations 86, 94 and 101) (Br. 36).

It appears from such Treasury Regulations that Article 113 pertains to subparagraph (5) of Section 113 (a) of the 1934, 1936 and 1938 Revenue Acts, rather than to the general provision of Section 113 (a). The Commissioner thus recognizes that Article 113 (a) (5)-1 (d), rather than Article 113 (a), relates to the basis of a beneficiary of property which had been purchased by testamentary

trustees during their administration of the trust estate. Thus Article 113 (a) (5)-1 (d) of the Treasury Regulations (1934 Act) supports petitioner's contention that property so purchased by a testamentary trustee and distributed to a beneficiary of a trust is property "acquired by will".

It clearly appears from the decision of this Court in *Lyeth* v. *Hoey*, 305 U. S. 188, that the exemption provided by Section 22 (b) (3) of the Revenue Act of 1932 (which was identical with the provision of the 1928 Act) is not lost to beneficiaries and remaindermen if the executors or testamentary trustees, acting under powers granted them in the will, invest or reinvest the decedent's estate. It is submitted, therefore, that the basis provided by the third sentence of Section 113 (a) (5) is not lost to a beneficiary or remainderman under similar circumstances.

In deciding the case of *Reynolds* v. *Commissioner of Internal Revenue*, 114 F. (2d) 804 (C. C. A. 4th), referred to by the Commissioner (Br. 36), the court held that securities purchased by testamentary trustees under the will of the taxpayer's father, and by said trustees distributed to the taxpayer, constituted property "acquired by bequest, devise, or inheritance" within the meaning of Section 113 (a) (5) of the 1934 Revenue Act. In so deciding, the court said that obviously the will of R. J. Reynolds (the taxpayer's father) "was the source of the taxpayer's acquisition" and cited the decision of the Second Circuit Court of Appeals in *Commissioner* v. *Gambrill*, which case will be argued immediately after this case has been submitted.

Conclusion.

For the reasons stated the decision of the Circuit Court of Appeals (Seventh Circuit) should be reversed.

Respectfully submitted,

Albert H. Veeder,
Francis E. Baldwin,
Counsel for Petitioners.

March, 1941.

APPENDIX.

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 22 (b). *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * * *

(3) *Gifts, Bequests, and Devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);

* * * * * *

SEC. 111. *Determination of Amount of Gain or Loss.*

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in Section 113, and the loss shall be the excess of such basis over the amount realized.

SEC. 113. *Basis for Determining Gain or Loss.*

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * *

(5) *Property Transmitted at Death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market

value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death;

• • • • •

(b) *Property acquired before March 1, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be:

(1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided), or

(2) the fair market value of such property as of March 1, 1913,

whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

SEC. 701. *Definitions.*

(a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

• • • • • •

(13) The term "taxpayer" means any person subject to a tax imposed by this Act.

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No. 346

In the Supreme Court of the United States

OCTOBER TERM, 1940

JEREMIAH D. MAGUIRE AND RUTH S. MAGUIRE,
PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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The Government believes the decision below to be correct but does not oppose the granting of a writ of certiorari because of the conflict between the decision below and that of the Circuit Court of Appeals for the Second Circuit in *Commissioner* v. *Gambrill,* 112 F. (2d) 530,[1] in which the Government is petitioning for certiorari. The decision

[1] Reported together with *Commissioner* v. *Gambrill* are three other cases in which the Government is likewise petitioning for certiorari. *Commissioner* v. *Campbell; Commissioner* v. *Knox;* and *Commissioner* v. *Rogers.*

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below also conflicts with that of the Circuit Court of Appeals for the First Circuit in *Commissioner* v. *Libbey*, 100 F. (2d) 458.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

SEPTEMBER 1940.

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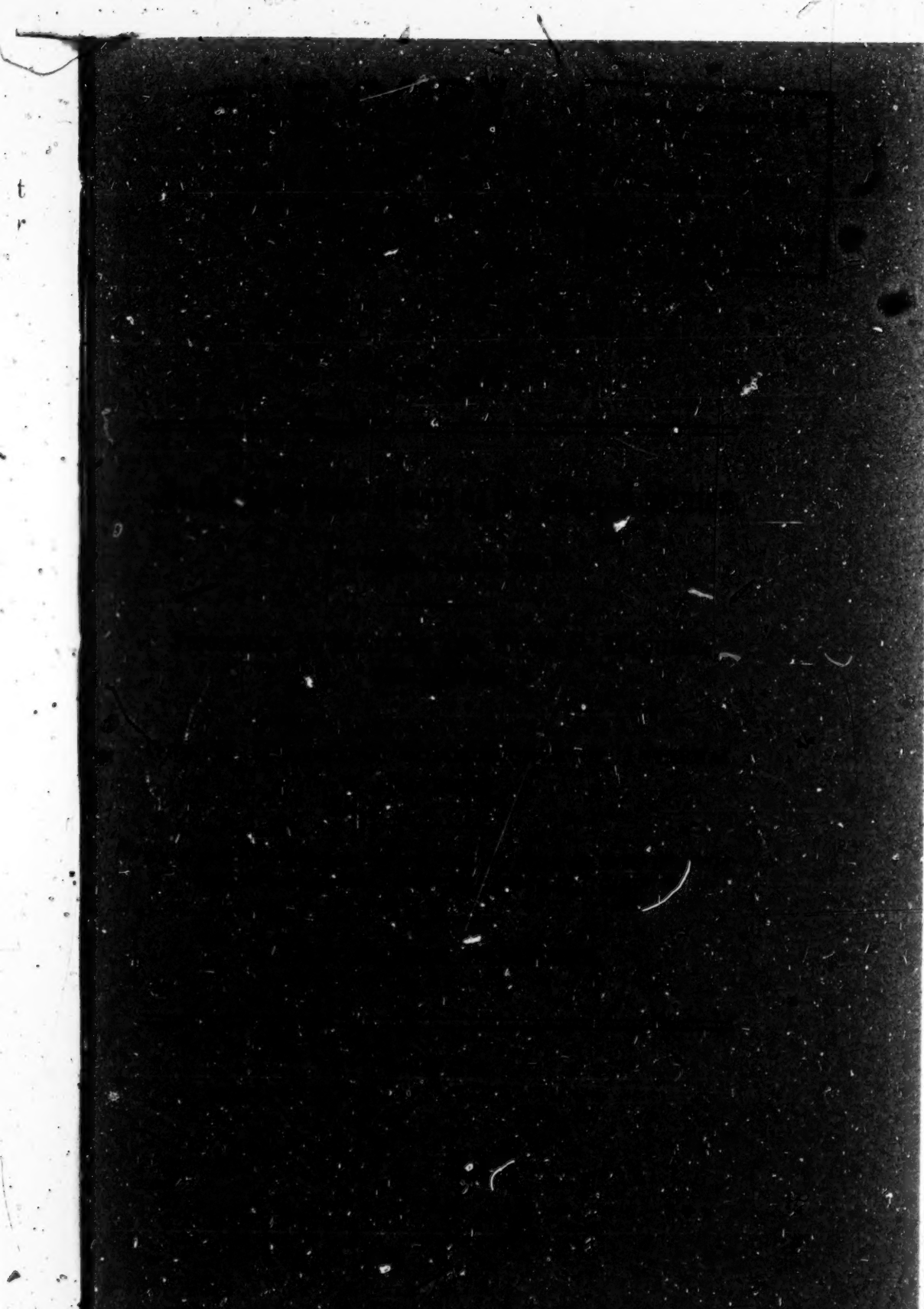

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum findings of fact and opinion of the Board of Tax Appeals (R. 31–47) are not reported. The opinion of the Circuit Court of Appeals (R. 68–75) is reported in 111 F. (2d) 843.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 5, 1940 (R. 75). On March 15, 1940, the Circuit Court of Appeals entered an order (R. 79) extending the petitioners' time within which to file a petition for rehearing until

further order of the court, but in any event until April 5, 1940. On April 4, 1940, the Circuit Court of Appeals entered an order (R. 83) extending petitioners' time to file a petition for rehearing until fifteen days after April 5, 1940. On April 17, 1940, they filed a petition for rehearing (R. 83), which was denied May 21, 1940 (R. 84). On June 12, 1940, the petitioners moved for permission to file a petition for reconsideration of their petition for rehearing (R. 88), which was denied on July 10, 1940 (R. 93). The petition for a writ of certiorari was filed August 19, 1940, and granted October 14, 1940. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Pursuant to a testamentary trust established under the will of petitioner's [1] father, petitioner's share was distributed to her 20 years after her father's death. She thus received not only securities formerly owned by the decedent but also other securities purchased by the trustees. During the year 1930, petitioner sold securities of both groups, and the questions presented relate to the proper

---

[1] Petitioners are husband and wife who filed a joint return (R. 3). The income involved is that of Ruth S. Maguire. Wherever the word "petitioner" is used in this brief it is intended to mean Ruth S. Maguire, unless the context indicates otherwise.

basis for determining gain or loss upon these sales, namely:

(1) Whether, under Section 113 (a) (5) of the Revenue Act of 1928, the basis of the first group of securities is their value when received by the trustees from the decedent's estate, or their value at the date of delivery by the trustees to petitioner; and

(2) Whether the basis of the second group of securities is their cost to the trustees or their value at the date of delivery by the trustees to petitioner.[2]

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in Appendix A, *infra,* pp. 41–43.

STATEMENT

The facts as stipulated (R. 14–30, 64–65) and as found by the Board of Tax Appeals (R. 32–36) may be summarized as follows:

Gustavus Swift died March 29, 1903 (R. 32). His will (R. 22–28), after certain specific bequests,

---

[2] Section 113 (b) of the Revenue Act of 1928 provides that the basis for determining gain or loss from the sale of property acquired before March 1, 1913, shall be the value specified in Section 113 (a), or the fair market value of the property on March 1, 1913, whichever is greater. Since there is no dispute as to this proviso it is not taken into account in the Questions Presented and is ignored throughout this brief. Likewise no mention is made of the corresponding provisions of other revenue acts.

devised the residue of his property in trust, and directed the trustees, not less than ten nor more than twenty years after the testator's death, to make final distribution of the corpus as follows (R. 25–26):

> * * * to my wife the one-third part thereof, the balance to be equally divided among my children, share and share alike, and should my wife not be living at the time of such distribution, then the same shall be divided equally among my children, share and share alike, the descendants of any deceased children in such distribution to take the proportion of their deceased parent, * * *.

On December 11, 1905, the Probate Court of Cook County entered its order (R. 29–30) discharging the executors of the estate of Gustavus Swift and approving their final account. Pursuant to this order the executors on that date turned over the balance of the estate to themselves as trustees (R. 33).

This case is concerned with the basis for determining gain or loss as to certain of the securities thus received by the testamentary trustees from the Swift estate, and as to other securities thereafter purchased by the trustees. In 1923 the trust was terminated and all of the assets then held by the trustees were turned over in kind to the eight children of the testator then surviving; i. e., petitioner Ruth S. Maguire and her brothers

and sisters (R. 33–35). These beneficiaries placed the securities in two *inter vivos* trusts which they created. Some were sold by the trustees of the new trusts in 1930, and others were sold in 1929 but part of the sales price was paid in 1930 (R. 34–35). It has been stipulated that the beneficiaries are taxable as though the sales were made by them individually (R. 19, 20, 21, 64–65).

The parties have stipulated the amount of gain which is taxable if the proper cost basis of the securities sold is their fair market value at the time of termination of the testamentary trust in 1923 (R. 19, 20). They have also stipulated the amount of gain which is taxable if the Commissioner's position is sustained on both points; that is, if the proper basis for securities originally owned by the decedent is their fair market value when distributed to the testamentary trustees in 1905, and if the proper basis for the securities subsequently purchased by the trustees is their cost to the trustees; with the proviso as to both classes of property that the 1913 value governs as to property acquired by the trustees before that date in instances where it exceeds the basis otherwise determined (R. 19–22, 64–65).

The Board of Tax Appeals held that the beneficiaries' basis is the value of the assets at the time of termination of the testamentary trust and delivery to the beneficiaries, i. e., March 29, 1923 (R. 39). The Circuit Court of Appeals reversed

the Board and sustained in full the contentions of the Commissioner (R. 68–75).

SUMMARY OF ARGUMENT

The court below was correct in holding that, under subdivision (5) of Section 113 (a) of the Revenue Act of 1928, petitioner's basis for determining gain or loss upon the sale of personal property which was owned by her father at his death and which came to her by general bequest through the testamentary trustees, is its value at the time of the distribution by the executors to themselves as trustees; and that petitioner's basis for property purchased by the testamentary trustees is governed not by subdivision (5) of Section 113 (a) but by the general provision of that section, under which the basis is cost to the trustees.

The historical development of the statutory provisions dealing with the basis for property acquired by gift or inheritance reveals a general plan to leave the value of such property, as of the date of gift or of the decedent's death, free from income tax in the beneficiary's hands, and to use that value as the beneficiary's basis for determining gain or loss on a subsequent disposition. This scheme gives effect for income tax purposes to all changes in value of property following a gift or transmission at death. We think that with the exception of Section 113 (a) (5) of the Revenue Acts of 1928 and 1932 there has been no legislative departure from this principle.

I. Property owned by the decedent at his death and passing to a beneficiary through a testamentary trust is acquired by the beneficiary by will. Section 113 (a) (5) of the Revenue Act of 1928 fixes as the basis for personal property acquired "by will," other than by specific bequest, its value "at the time of the distribution to the taxpayer."

No radical departure from the value-at-death rule was intended by this provision. The committee reports indicate that Congress intended to distinguish between those cases in which property vests in the beneficiary immediately upon death, such as realty, or is definitely marked as the legatee's at the date of death, such as specific bequests, and those in which the legatee must await administration and satisfaction of creditors before he can identify his property as separate from the funds of the estate. The legislative purpose is accordingly observed by construing the words "the time of the distribution to the taxpayer" as contemplating the time when distribution is made out of the estate. Such a construction does no violence to these words, since it is reasonable to conclude that for the purpose of this section a beneficiary receives distribution of property when distribution is made to the trustee to be held for his benefit.

To construe the words as referring to a distribution at the termination of a testamentary trust would create a period, frequently of lengthy duration, during which changes in value would be with-

out tax effect. Similarly, it would enable trustees to sell trust property or distribute it in kind, according to which course would secure an advantageous basis for determining gain or loss.

II. Subdivision 5 of Section 113 (a) of the Revenue Act of 1928, dealing with property acquired "by will," does not cover property purchased by testamentary trustees following the decedent's death and distributed to the beneficiary. While we concede in view of the statements in the committee reports that subdivision (5) was intended to embrace purchases by an executor or an administrator, it should not be extended by implication to include property purchased by trustees.

To do so would derogate from the general scheme of the revenue acts and the sound tax principle that any gain or loss accruing after the date of death is to be given tax effect. Further, if the trustees themselves sold property which they had purchased, the basis would necessarily be cost. To hold that a different basis prevails for the property in the hands of the beneficiaries would enable trustees either to sell the property or to distribute it in kind as would be advantageous for tax purposes. Such a result is plainly undersirable, and is not required by the terms of Section 113 (a) (5). Property purchased by trustees is not acquired "by will" within the ordinary sense of that phrase, nor does the language of the committee reports require such an extension. There may be some

basis for considering property purchased by an executor as having been transmitted to the beneficiary at death or acquired by will, on the ground that until distribution by the decedent's estate the basic testamentary disposition is in suspense. But such a theory is inapplicable to property purchased by a testamentary trustee.

Furthermore, the 1928 and 1932 Acts should be interpreted in harmony with prior and subsequent acts, as nearly as may be, and property purchased by a fiduciary is not acquired by bequest, devise, or inheritance within the meaning of the revenue acts prior to the 1928 Act and subsequent to the 1932 Act, and is not acquired by gift within the meaning of any of the revenue acts: the beneficiary's basis for such property is cost to the fiduciary.

ARGUMENT

Introductory.—The controversy in this case is as to the correct method of determining the gain or loss realized by the petitioner Ruth Swift Maguire upon the sale by her of certain assets which she had received from a testamentary trust created by her father's will. Some of these assets had been owned by her father at his death and were turned over by his executors to themselves as testamentary trustees; others were purchased by the testamentary trustees with trust funds. The dispute here turns on the proper interpreta-

tion and application of Section 113 (a) of the Revenue Act of 1928 (Appendix A, *infra*, p. 41) prescribing the basis to be used in ascertaining gain or loss upon the sale of property. Those provisions can, however, be better understood if their origin and relation to comparable provisions in other revenue acts are first briefly explained.

The revenue acts before that of 1918 contained no very definite provisions as to the basis to be employed in determining the gain or loss upon the disposition of property. See Section 2 (c) of the Revenue Act of 1916. This omission was partly supplied, however, under the 1916 Act by Treasury Regulations 33, revised, which provided that the appraised value at the time of the decedent's death was the basis for determining gain upon the sale of property acquired by inheritance (Art. 4, par. 44), and that the fair market value of stocks acquired by gift was the basis for computing gain derived or loss sustained from the sale thereof (Art. 4, par. 41).

The Revenue Act of 1918, c. 18, 40 Stat. 1057, contained a general provision (Sec. 202 (a)) that for the purpose of ascertaining gain or loss from the sale or other disposition of property the basis should be the cost of the property. There were no express exceptions for property acquired by gift or devolving at death. However, Article 1562 of Treasury Regulations 45, interpreting this Act, provided that the basis for property acquired by

gift, bequest, devise, or descent should be the fair market value at the date of acquisition and, in effect, that value at date of acquisition of property acquired by bequest, devise, or descent meant appraised value at the decedent's death. The Article refers to Sec. 213 (b) (3) of the 1918 Act, which excludes from taxable income the value of property acquired by gift, bequest, devise, or descent, and it is evident that that statutory provision formed the basis for the regulation's departure from the basis of cost rule stated in Sec. 202 (a).

In the Revenue Act of 1921, c. 136, 42 Stat. 227, there appeared, for the first time, as exceptions to the rule that cost shall constitute the basis, special provisions defining the basis of inheritance and gift property. The basis for property obtained by bequest, devise, or inheritance, and by gift on or before December 31, 1920, was defined as the fair market value of the property "at the time of such acquisition" (Sec. 202 (a) (2) and (3)) and the Committee reports indicate that this was a continuation of the existing law as stated in the Treasury Regulations. But for property acquired by gift after December 31, 1920, the donee was given the basis of the donor or of the last preceding owner by whom it was not acquired by gift, the Committee reports stating that this departure from the existing rule was made to prevent evasion: under the regulations interpreting the 1918

Act, an owner of property the value of which had increased could give it to a member of his family, who could then sell it without incurring tax liability for the increase in value of the property while in the donor's hands.[3]

The Revenue Act of 1924, c. 234, 43 Stat. 253, continued unchanged the provisions of the Revenue Act of 1921 with respect to property acquired by bequest, devise, or inheritance (Sec. 204 (a) (2), (4), and (5)). It added (by Sec. 204 (a) (3) and (4)) to the existing gift provisions similar provisions relating to property transferred in trust *inter vivos*.[4] The provisions of the 1924 Act relative to the basis for property acquired by gift, bequest, devise, or inheritance were reenacted without change in the Revenue Act of 1926 (c. 27, 44 Stat. 9, Sec. 204 (a) (2), (3), (4), and (5)).

Thus "the time of * * * acquisition" was the critical date for valuing property passing at

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[3] H. Rep. No. 350, 67th Cong., 1st Sess., p. 9. Cf. S. Rep. No. 275, 67th Cong., 1st Sess., pp. 10–11; H. Conference Rep. No. 486, 67th Cong., 1st Sess., p. 16.

[4] It is not entirely clear what, if anything, the new provisions added, except as to transfers in trust for a partial or inadequate consideration, since the existing gift provisions were applicable to gifts in trust, as well as to ordinary gifts. *Helvering* v. *New York Trust Co.*, 292 U. S. 455. The Committee reports shed little light on the subject. See S. Rep. No. 398, 68th Cong., 1st Sess., p. 17 (1939–1 Cum. Bull. (Part 2), 266, 278); H. Rep. No. 179, 68th Cong., 1st Sess., p. 16 (1939–1 Cum. Bull. (Part 2), 241, 253).

death, under the 1921, 1924, and 1926 Acts, and under the regulations interpreting the 1918 Act. Considerable litigation arose as to the meaning of this phrase; as a consequence the statutory provisions were amended in the Revenue Act of 1928.[5] It is with the new provisions thus introduced in 1928 that we are here concerned.

Section 113 (a) of the Revenue Act of 1928 (Appendix A, *infra*, p. 41) provides that the basis for determining the gain or loss from the sale of property shall be the cost of such property, except as different bases are therein specified for particular types of property. The exceptions with respect to property acquired by gift or transfer in trust *inter vivos*, contained in subdivisions (2), (3), and (4), are substantially the same as those contained in the 1924 and 1926 Acts. Subdivision (5), with which we are here particularly concerned, provides for a basis of value at the date of death for realty acquired by devise or intestacy, personalty acquired by specific bequest, and property acquired by the decedent's estate from the decedent, and that "In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the dis-

[5] H. Rep. No. 2, 70th Cong., 1st Sess., p. 18; S. Rep. No. 960, 70th Cong., 1st Sess., p. 26. The Senate Report, so far as pertinent to this case, is set out in Appendix B.

tribution to the taxpayer." The provisions of the 1928 Act were repeated in the 1932 Act.

In the meantime, however, the decision of this Court in *Brewster* v. *Gage*, 280 U. S. 327 (1930), had cleared up much of the uncertainty under the 1918–1926 Acts. That case involved personal property acquired by a residuary legatee and sold in 1921 and 1922, and was decided under the Revenue Acts of 1918 and 1921. As has been seen, the latter Act, and the regulations under the former Act, specified value at the time of "acquisition" as the basis for property acquired by bequest, devise, or inheritance. This Court held that the time of "acquisition" was the date of the decedent's death, and not the date the executors distributed the property to the legatee.

Since *Brewster* v. *Gage* thus eliminated much of the controversy as to the meaning of "the time of * * * acquisition" in the 1926 and earlier acts, Congress, in Section 113 (a) (5) of the Revenue Act of 1934, reverted to the form of the 1926 Act, that is, that property acquired by bequest, devise, or inheritance shall take as its basis its fair market value at the time of its acquisition.[6] And the 1926 terminology has since been preserved in Section 113 (a) (5) of the Revenue Acts of 1936 and 1938 and of the Internal Revenue Code.[7]

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[6] See S. Rep. No. 558, 73d Cong., 2d Sess., pp. 34–35; H. Rep. No. 704, 73d Cong., 2d Sess., p. 28.

[7] The Treasury Regulations with respect to 1926 and earlier and 1934 and later Acts have consistently provided

The statutory provisions with which we are here concerned were thus in effect only temporarily, in the 1928 and 1932 Acts. The foregoing summary likewise shows that those Acts depart to some extent from the theory which has otherwise obtained as to the treatment of gains and losses realized on the sale of property acquired by bequest, devise, inheritance, or gift. That theory is, basically, that the beneficiary should not be required to pay income tax upon the value of such gift or inheritance property; that to use the usual basis rule of cost for such property would have that result, since the beneficiary's cost would be zero; hence the beneficiary is given as basis the value of the property when the gift was made, or the inheritance transmitted by death, with the exception, to prevent evasion, that property given *inter vivos* after 1920 takes the donor's cost as basis in the donee's hands. Thus

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that the date of the decedent's death is the time of acquisition specified by the statutes. Regulations 33 (Revised), par. 44 (1916 Act); Regulations 45, Art. 1562 (1918 Act); Regulations 62, Art. 1563 (1921 Act); Regulations 65 and 69, Art. 1594 (1924 and 1926 Acts); Regulations 86, 94, and 101, Art. 113 (a) (5)–1 (1934, 1936, and 1938 Acts); Regulations 103, Sec. 19.113 (a) (5)–1 (Internal Revenue Code). Cf. *Brewster* v. *Gage*, 280 U. S. at p. 336.

The 1934, 1936, and 1938 Acts, and the Internal Revenue Code, continued without change here material the provisions of the earlier acts with respect to the basis for property acquired by gift or transfer in trust *inter vivos*, with the exception that, in Section 113 (a) (2) of the later acts and Code, loss realized upon the sale of property acquired by gift after 1920 was limited to the difference between the sale price, and the donor's basis or value at date of gift, whichever was lower.

the scheme is to leave no time gaps following the date of gift or death during which fluctuations in value of property are immunized from tax effect; stated another way, there are no gaps in the continuity of basis following the date of gift or death; in fact, there is no gap in such continuity even prior to the date of a gift made since 1920.

That Section 113 (a) (5) of the 1928 and 1932 Acts effected some departure from the stated principle is conceded. It is with the extent of that departure that we are here concerned. We will contend Congress could not have intended a material departure.

I

THE BASIS FOR PROPERTY OWNED BY PETITIONER'S FATHER AND PASSING TO HER THROUGH THE EXECUTORS AND TESTAMENTARY TRUSTEES IS ITS VALUE WHEN DISTRIBUTED BY THE EXECUTORS TO THE TRUSTEES

We are here concerned with property which petitioner's father owned at his death and which was turned over by his executors to themselves as the testamentary trustees and was eventually delivered by the trustees to petitioner. We agree with petitioner that her basis for such property is its fair market value "at the time of the distribution to the taxpayer" as that phrase is used in the third sentence of subdivision (5) of Section 113 (a) of the Revenue Act of 1928. The disagreement is as to the meaning of this phrase. We contend, and the court below held, that it refers to the date of

distribution by the decedent's estate, while petitioner contends that it refers to the delivery of the property into her hands by the testamentary trustees.

If the trustees had themselves sold the property, it is agreed both by petitioner and the Government that their basis would have been the value of the property when distributed to them by the executors. *Commissioner* v. *Taft*, 101 F. (2d) 1007 (C. C. A. 6th), affirming 34 B. T. A. 603. Cf. *Helvering* v. *New York Trust Co.*, 292 U. S. 455. In such a case the date of the distribution by the executors would be the "time of the distribution to the taxpayer." Petitioner contends, however, because the trustees did not sell the property, but distributed it in kind to the beneficiaries, that the basis for the property in the hands of the beneficiaries is different from what it was in the hands of the trustees, and is its value when distributed to the beneficiaries. Petitioner urges, in other words, that the "time of the distribution to the taxpayer" referred to in the statute shifts from the date of distribution by the executors to the date of distribution by the trustees, if the latter distribute in kind, or perhaps that there are two times of distribution (and more if there are successive testamentary trusts), and that the date of the last distribution is the decisive one under the statute. Petitioner asserts that this construction is required by the use of the word "taxpayer," for the reason that that term can only refer to the person or other

tax entity who happens to have sold the property and whose tax liability is in question. We contend that the "time of the distribution to the taxpayer" is the date of distribution by the executors, and that it so remains whether or not the testamentary trustees sell the property or distribute it in kind. We think the word "taxpayer" refers to the person or other taxable entity to whom the property is distributed upon termination of the administration of the decedent's estate.

At the outset, it should be noted that petitioner's construction of subdivision (5) imputes a wide avenue for tax avoidance under the 1928 and 1932 Acts. For if property distributed in kind by trustees takes as its basis its value when distributed by the trustees, instead of the basis it had in the hands of the trustees—that is, its value when distributed by the executors—trustees are enabled either to sell the property or to distribute it in kind as would be advantageous for tax purposes. How wide the spread between the two bases might be is suggested by the long duration of the trust in the present case.

It is true that under any construction of subdivision (5) of Section 113 (a) of the Revenue Acts of 1928 and 1932 there is a possibility of tax avoidance, in that the basis for property sold by executors in the course of administration is its value at the decedent's death, while property distributed by executors takes as its basis its value when distrib-

uted. This loophole was noted in the Senate Committee Report on the 1934 Act, which restored subdivision (5) to the form it had had in 1926 and before. S. Rep. No. 558, 73d Cong., 2d Sess., pp. 34–35. This opportunity for tax avoidance is relatively insignificant, however, since the period of administration is ordinarily short, at least as compared with the duration of testamentary trusts. And if the Senate Committee had thought that a testamentary trustee, after many years of increase or decrease in value during the life of the trust, possessed a similar power of manuipulation, to sell before distribution or to distribute in kind as seemed tax wise, it probably would have referred to this much more sizeable loophole. Particularly so, when it is remembered that as early as 1921 the donee of a gift *inter vivos* was given the donor's basis to prevent the use of a less facile method of tax manipulation. See *supra,* p. 11–12.

Similarly, while some inequality of treatment results from using, as the 1928 and 1932 Acts require, a value at death basis for realty and a basis of value at distribution of the decedent's estate for personalty acquired by general bequest and intestacy, nevertheless the disparity ordinarily is not marked, since distribution usually follows death within a reasonable time. On the other hand, realty and personalty may be held in testamentary trusts for many years following the decedent's death and the closing of his estate, as happened here. The dis-

parity between the treatment of a remainderman of realty and a remainderman of personalty would become very great, if the latter were given a basis of value at time of distribution by the trust, instead of distribution by the executor.

Petitioner's construction of subdivision (5) is further objectionable in that it departs widely from the principle that upon the sale of property acquired by gift, bequest, devise or inheritance, tax effect is to be given to any changes in value which have occurred since the date of the gift or of the decedent's death. This principle, it is shown, *supra*, pp. 10–16, has generally been followed in the revenue acts, and it is obviously a sound principle of tax administration. We concede that the 1928 and 1932 Acts departed from this principle to some extent, by providing, in substance, that in the case of personal property passing otherwise than by specific bequest no tax effect was to be given to changes in value during the period of the administration of the estate. That limited departure was, however, relatively unimportant because the period of administration is not usually long. The departure which would be effected by petitioner's construction of the acts would be far more extensive. We submit that no such construction should be accepted unless it is clearly indicated by the legislative history. The legislative history does not support petitioner's construction: if anything it shows

that "the time of the distribution to the taxpayer" refers only to the distribution by the executors.

As introduced in the House, the bill which became the Revenue Act of 1928 (H. R. 1, 70th Cong., 1st Sess.) provided, in Section 113 (a) (5), that the basis for all property acquired by bequest, devise, or inheritance should be the value of the property at the date of the decedent's death.[8] The Senate Committee changed the language of the House bill into the form in which it was finally enacted. The Senate Committee Report (Appendix B, *infra*, pp. 45–47) states that the decision in *McKinney* v. *United States*, 62 C. Cls. 180, has caused confusion "as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate."[9] The report then declares that the House bill is inadequate to take care of some situations, mentioning specifically a purchase by executors followed by distribution in kind to the beneficiaries. The report then outlines the terms of Section 113 (a) (5) as the Senate

[8] The House Committee report stated: "Under existing law, the basis * * * is the value at the date of 'Acquisition,' which is indefinite and has given rise to controversy." H. Rep. No. 2, 70th Cong., 1st Sess., p. 18.

[9] The *McKinney* case held that an executor did not realize gain when he sold property for more than its appraised value at the decedent's death but for less than its appraised value in the decedent's hands on March 1, 1913. The decision went on the ground that the executor stood in the decedent's shoes.

Committee has revised it. It states that the date of death rule applies to personalty acquired by specific bequest and to realty acquired by general or specific devise or intestacy, and declares that "In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death . * * *." After noting that the same rule is applicable in the case of all property transmitted by the decedent and sold by the executor, the report goes on to say that in all other cases the basis is the value of the property at the time of the distribution to the taxpayer. It adds: "The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary." The House Conference Report is substantially to the same effect. H. Conf. Rep. No. 1882, 70th Cong., 1st Sess., p. 14.

Thus the difference in treatment accorded to realty and specific bequests of personalty on the one hand, and to general bequests and intestate devolution of personalty on the other, appears to rest upon a distinction between those cases in which property either vests in the heir or devisee at death, such as realty, or is definitely marked at the time of death as that of the legatee, such as personalty which is the subject of specific bequest,

and those cases in which the legatee must normally await administration and satisfaction of creditors before he can with any degree of certainty identify the property as his own, separate from the funds of the estate.[10]

If this is the correct explanation of the legislative purpose in enacting Section 113 (a) (5), that purpose is served by construing the words "at the time of the distribution to the taxpayer" as signifying the time when the distribution is made out of the estate. At that time the property which remains for the legatees after satisfaction of the debts is identified and distributed to the legatees or for their benefit.

Realistically, it is plain, there was no conscious Congressional intention with respect to the problems here presented: The committee reports on the 1928 Act show a preoccupation with the decedent's death, or the administration of his estate, and not with subsequent transmissions of property. And, as already shown, this same preoccupation is found in the report of the Senate Committee on the 1934

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[10] This classification corresponds to the usual order of sale of the decedent's assets to pay his debts. Generally speaking, personalty is invaded before realty, which can only be reached by court order, and general bequests are invaded before specific ones. In case of intestacy the decedent's personalty, and in case of a will his residual personal estate, are the primary funds for the payment of his debts. Woerner, *The American Law of Administration* (3d Ed.). Vol. 3, Sec. 489 *et seq.*, pp. 1705 *et seq.*

Act, when subdivision (5) was restored to the form it had in 1926 and before. See *supra*, p. 19.

Section 113 (b) likewise points to the conclusion that petitioner's basis for the property in question is its value on the date the executors turned it over to themselves as trustees. Section 113 (b) provides that the basis for property "acquired" before March 1, 1913, shall be the value on that date, if that is higher than the basis determined under Section 113 (a). The decedent in the present case died before March 1, 1913, and the property in question, whatever may be deemed to be "the time of the distribution to the taxpayer", was "acquired" by the petitioner at the decedent's death. *McFeely* v. *Commissioner*, 296 U. S. 102. Thus, if petitioner is right, comparison must be made between 1913 value and value in 1923, when the trust terminated. But this contruction gives a strange effect to Section 113 (b), which is intended to exempt from tax accruals in value before, and not after, March 1, 1913. On the other hand, if, as we contend, Section 113 (a) (5) refers to distribution by the decedent's estate, then in the case of a decedent dying before March 1, 1913, the distribution probably will have occurred before (as it did in the instant case), or in any event not long after, March 1, 1913.

In short, our position is that the distribution which Congress was thinking about in enacting Section 113 (a) (5) of the 1928 Act was the dis-

tribution by the decedent's estate; and that to refer Section 113 (a) (5) to the date of termination of a testamentary trust many years thereafter would be completely out of harmony with the general scheme of the revenue acts and would lead to unsound results.

Admittedly, the Bureau of Internal Revenue has not pursued a consistent construction of the phrase "the time of the distribution to the taxpayer" in Section 113 (a) (5) of the 1928 and 1932 Acts. Originally it took the view, which we now defend, that it means date of distribution by estate to trust and not date of delivery by trust to beneficiary. G. C. M. 6195, VIII–1 Cum. Bull. 99 (1929). In G. C. M. 11309, XII–1 Cum. Bull. 126 (1933), this stand was reversed, and it was held that the date of delivery by trust to beneficiary was intended. Subsequently, the Bureau again reversed its stand and readopted the construction we now urge. G. C. M. 14893, XIV–1 Cum. Bull. 202 (1935). As a result of the intermediate view, the point here involved was conceded by the Government in several cases. *Lane* v. *Corwin*, 63 F. (2d) 767 (C. C. A. 2d), certiorari denied, 290 U. S. 644; *Becker* v. *Anchor Realty & Investment Co.*, 71 F. (2d) 355 (C. C. A. 8th); *United States* v. *Van Nostrand*, 94 F. (2d) 510 (C. C. A. 1st); *Clyde* v. *Commissioner*, 32 B. T. A. 799.

In addition to the conflicting decisions now before this Court (*Commissioner* v. *Gambrill*, and re-

lated cases, Nos. 472-475, this Term) the question here presented was decided adversely to the Government's contention in *Commissioner* v. *Libbey*, 100 F. (2d) 458 (C. C. A. 1st), one judge dissenting. *Jenkins* v. *Smith*, 21 F. Supp. 433 (D. Conn.), reversed on other grounds, 99 F. (2d) 827 (C. C. A. 2d), is in the Government's favor. With reference to the *Libbey* decision, it may be said that the majority relied heavily upon their previous decision in *United States* v. *Van Nostrand, supra*, in which the Government had not contested the point. The taxpayer's contention (Br. 12) that the decision below conflicts in principle with *Haskell* v. *Commissioner*, 78 F. (2d) 869 (C. C. A. 3d), certiorari denied, 296 U. S. 652; *Williamson* v. *Commissioner*, 100 F. (2d) 735 (C. C. A. 6th), certiorari denied, 307 U. S. 623; and *Commissioner* v. *Taft*, 101 F. (2d) 1007 (C. C. A. 6th), is not well founded. In each of those cases the taxpayer had received distribution directly from the executors or administrators of the decedent's estate, and the date of that distribution was taken to be controlling.

II

THE BASIS FOR PROPERTY PURCHASED BY THE TRUSTEES AND DELIVERED TO PETITIONER IS ITS COST TO THE TRUSTEES

In the present case some of the property sold by petitioner had been brought by the testamentary trustees and delivered to her upon termination of the trust. Subdivision (5) of Section 113 (a) of

the Revenue Acts of 1928 and 1932 provides, as has been seen, for a basis of value at the date of death for realty acquired by devise or intestacy, personally acquired by specific bequest, and property acquired by the decedent's estate from the decedent, and that "In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer." The court below held that the quoted sentence was inapplicable to the property bought by the trustees, and that its basis was cost to the trustees, under the general provision of Section 113 (a). Petitioner contends that the quoted sentence applies, and requires the use of value at the date of delivery by the trustees.

The statutory provisions defining basis are concerned with the particular property sold. The cost of that particular property normally is used to ascertain the amount of any gain or loss, but under the provision here in question a different rule applies if the property was acquired "by will or by intestacy." Necessarily, therefore, the inquiry is whether the particular property sold was so acquired. The answer to that is not, we submit, always the same as the answer to whether the interest or estate of which the specific property sold was a part, was so acquired. In this case the interest of petitioner in her father's estate was held in trust following his death. The property purchased by

the trustees during this period was not a part of the original inheritance which passed from the decedent at this death, just as it would not have been a part of an original *inter vivos* gift. Therefore, it was not acquired "by will" within the usual sense of that phrase. On the other hand, it might in a limited or narrow sense be considered as acquired by will, since it came to petitioner because of the directions of her father's will.

In attempting to determine which of these constructions Congress intended, we think it important here, as under Point I, that petitioner's interpretation involves recognition of an avenue for tax avoidance If the trustees themselves sold property which they had purchased, the basis would necessarily be cost. To hold that a different basis prevails for the property in the hands of the beneficiaries would enable trustees either to sell the property or to distribute it in kind, as would be advantageous for tax purposes. Such a result is practically undesirable. Likewise, it is theoretically unsound. If the trustees themselves sold property they had purchased with funds of the estate, the transaction would be taxable as an ordinary one for profit, using a cost basis, just as it would if there had been no trust and the beneficiary had made both purchase and sale. To change the basis merely because the trustee distributes to the beneficiary before instead of after the sale, is to reach an anomalous result. Cf. *Brewster* v. *Gage*,

280 U. S. 327, 336. Moreover, the construction urged by petitioner would derogate from the general scheme of the revenue acts and the sound tax principle, discussed under Point I, that upon the sale of property acquired by gift, bequest, devise, or inheritance, tax effect is to be given to any changes in value which have occurred since the date of the gift or of the decedent's death.

It is true, as already acknowledged in Point I, that Section 113 (a) (5) of the 1928 and 1932 Acts does depart to some extent from this principle, and that it does embody some opportunity for tax avoidance. The phrase "at the time of the distribution to the taxpayer" expressly exempts from tax effect changes, during the period of administration, in the value of property which was owned by the decendent, if the property is distributed in kind by the executors. And while we think that purchases by executors would not be "property * * * acquired either by will or by intestacy" if those words stood alone, we concede, in view of the statements in the Senate and Conference Committee reports (see *supra*, pp. 21–22), that this provision was intended to include property purchased by an executor. But there is no reason, we submit, to extend it further by implication.

As has been seen, the Committee reports refer only to purchases by executors, and make no mention of purchases by testamentary trustees. Sub-

division (5), as the court below noted, is given the title *"Property transmitted at death."*[11] There may be some basis for including executors' purchases under a provision so headed, or for considering them as in a certain sense acquired by the legatees by will. Such property is acquired before administration of the testator's estate is completed; it forms part of the estate administered and distributed to the legatees. If not in a strict sense transmitted at death, it is nevertheless part of the property transmitted to those next in line to the decedent. Property purchased by a testamentary trustee is not of this character.

There is a further distinction between the two types of property. While the decedent's estate is in the course of administration, it is under the direct supervision of the probate court; the executor or administrator is an officer of the court and acts by authority of law. The purpose of the administration is to collect the decedent's assets, pay his debts, and distribute the remainder according to the decedent's will, or if there is no will, to those entitled under the inheritance laws. In performing these functions the law, through its instrumentality, the probate court and the officers thereof, is acting as it is presumed the decedent would have done could he have attended to

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[11] The title of an ambiguous statutory section may be taken into account in construing it. *Knowlton* v. *Moore*, 178 U. S. 41, 65.

his own affairs at the moment of his death. Woerner, *The American Law of Administration* (3d Ed.), Vol. 1, Secs. 9–10, pp. 8–10. But with the termination of the administration and the distribution of the estate by the executor or administrator, this active court management and supervision of the decedent's property and affairs ceases. A testamentary trustee is a legatee under the decedent's will and receives distribution like any other legatee.[12] True, the trustee holds the legacy in trust for others, but the trust is essentially no different from one created by an inter vivos instrument. The administration of both kinds of trusts is within the jurisdiction of the general courts of equity; except as the jurisdiction of probate courts has been extended in some states by statute, the administration of testamentary trusts is not within their competence. Woerner, *op. cit.*, Vol. 1, Sec. 151, pp. 517–519; Vol. 2, Sec. 229, p. 778.

Thus it is possible to consider that until distribution by the decedent's estate, basic testamentary disposition is in suspense; and that for tax purposes acquisition of personal property passing by general bequest or intestacy does not occur until that distribution is made. In this

[12] *Colton* v. *Colton*, 127 U. S. 300, 308–309; *Newcomb* v. *Williams*, 9 Met. (Mass.), 525; *Lockman* v. *Reilly*, 95 N. Y. 64, 72; *Matter of Logan*, 131 N. Y. 456; *Crawford* v. *Cemetery Ass'n*, 218 Ill. 399; *Weigel* v. *Commissioner*, 96 F. (2d) 387, 391 (C. C. A. 7th); 3 Bogert on Trusts and Trustees (1935 Ed.), Sec. 583.

light property purchased by the executor prior to that distribution is acquired by the distributee by will, as though the testator (in whose stead the executor is acting) had himself made the purchase and passed the property on under his will. But once the administration is completed and certain property has been distributed to the legatees pursuant to the will's terms, the basic testamentary disposition has been effected. Subsequent dealings in the property by a distributee who holds in trust for another involve no testamentary disposition; a subsequent purchase out of the funds of the legacy involves only a transaction for profit entered into by one acting as trustee for another. We submit that the beneficiary who receives property so purchased cannot be said to have acquired it by will within the meaning of Section 113 (a) (5) of the 1928 Act.

It seems unlikely that Congress intended on the one hand to treat property purchased by inter vivos trustees and distributed to the beneficiary as taking the usual cost basis in the beneficiary's hands, and on the other hand to deal with property purchased by testamentary trustees under the special exception to the cost basis rule found in subsection (5) of Section 113 (a). Yet it is reasonably clear that Congress did intend to use cost basis for property purchased by inter vivos trustees, since the exceptions to the cost basis rule found in subsections (2) and (3) of Sec. 113 (a) could not sensibly be

applied to property so purchased. They provide for use of the basis of the donor or transferor; but purchased property never had such a basis. As has been pointed out, subsections (2) and (3) are substantially identical with provisions found in all of the Revenue Acts from 1924 onwards. Beginning in 1934 the Treasury Regulations have expressly provided that property purchased by an inter vivos trustee takes the trustee's cost as basis in the beneficiary's hands.[13] Subsections (2) and (3) speak of property acquired by "gift" and "transfer in trust" while subsection (5) speaks of property acquired by "will." The language and subject matter are very similar. We submit that if property purchased by inter vivos trustees is not acquired by gift or transfer in trust under subsections (2) and (3), it is not acquired by will under subsection (5).

As has already been seen, the revenue acts other than those for 1928 and 1932 provide that the basis for property "acquired by bequest, devise, or inheritance," shall be its value at the time of acquisition. The words "acquired either by will or by intestacy" in the 1928 and 1932 Acts should, so far as possible, be given the same meaning as the phrase "acquired by bequest, devise, or inheritance" in the other acts. And we think it is clear that the phrase employed in the other acts does not

[13] Treasury Regulations 86, 94, and 101, Arts. 113 (a) (2)-1 (d), 113 (a) (3)-1 (c); Treasury Regulations 103, Secs. 19.113 (a) (2)-1 (d), 113 (a) (3)-1 (c).

embrace property purchased by executors or trustees. The basis under these acts is the fair market value thereof at the date of acquisition. And the Senate and House Committees said, in conforming the 1934 Act to the 1926 Act in this respect,

> the Supreme Court has defined "the date of acquisition" to mean the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal. (*Brewster* v. *Gage*, 280 U. S. 327.) [14]

Though *Brewster* v. *Gage* dealt with a residuary legatee, a number of circuit courts of appeals have given the doctrine of that case its logical application to a remainderman who takes property following a testamentary trust; those courts have held that the remainderman acquires at the decedent's death property passing to him from the decedent through the testamentary trust.[15] This interpretation effectuates the obvious intention of Congress that there shall be no gap in the continuity of basis following the decedent's death—that no increments in the value of property accruing after

[14] Report of Senate Finance Committee, S. Rep. No. 558, 73d Cong., 2d Sess., pp. 34–35; Report of House Ways and Means Committee, H. Rep. No. 704, 73d Cong., 2d Sess., p. 28.

[15] *Chandler* v. *Field*, 63 F. (2d) 13 (C. C. A. 1st), certiorari denied, 289 U. S. 758; *Warner* v. *Commissioner*, 72 F. (2d) 225 (C. C. A. 2d), certiorari denied, 293 U. S. 620; *Roebling* v. *Commissioner*, 78 F. (2d) 444 (C. C. A. 3d); *Beers* v. *Commissioner*, 78 F. (2d) 447 (C. C. A. 3d), certiorari denied, 296 U. S. 620; *Molter* v. *Commissioner*, 69 F. (2d) 7 (C. C. A.

that date shall go untaxed under the terms of the statutory provision in question as it was written in the Acts of 1926 and before, and 1934 and thereafter.

If these decisions are correct, it cannot reasonably be concluded that that property "acquired by bequest, devise, or inheritance," includes property purchased by testamentary trustees. For if it did, time of acquisition would necessarily refer either to the date of purchase by the trustees, or the date of termination of the trust and transfer of the property by the trustees to the beneficiary. To use the first date would be consistent with the rule that the beneficiary's acquisition of property owned by the decedent at his death relates back to death, but would result in using a basis of fair market value at the moment of purchase, instead of the more logical cost basis. There is no reason to believe that Congress intended to leave out of tax account advantages or disadvantages inhering in the purchase itself. On the other hand, to use the date of termination of the trust would be incon-

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7th); *Hopkins* v. *Commissioner*, 69 F. (2d) 11 (C. C. A. 7th), certiorari denied, 293 U. S. 560; *Huggett* v. *Burnet*, 64 F. (2d) 705 (App. D. C.). A few cases, which we contend to be unsound in our brief in the *Gambrill* and related cases, Nos. 472–475, hold that a contingent remainderman does not acquire until his remainder vests. *Pringle* v. *Commissioner*, 64 F. (2d) 863 (C. C. A. 9th), certiorari denied, 290 U. S. 656; *Forbes* v. *Commissioner*, 82 F. (2d) 204 (C. C. A. 1st); *Reynolds* v. *Commissioner*, 114 F. (2d) 804 (C. C. A. 4th), pending on petition for certiorari, No. 684, this Term.

sistent with the rule applicable to property owned by the decedent at his death and passed to the beneficiary through the trust, since it would exempt from tax effect gains or losses in value accruing during the period between purchase and transfer to the beneficiary.

The answer, we submit, is that the provision relating to property acquired by bequest, devise or inheritance, found in all of the acts except those of 1928 and 1932, does not apply to property purchased by testamentary trustees. Property so purchased is acquired by the beneficiary by purchase, and its basis in his hands is the trustees' cost. Since 1934 the Treasury Regulations have expressly so provided. Article 113 (a) (5)–1 (d) of Treasury Regulations 86, 94, and 101, promulgated under the Revenue Acts of 1934, 1936, and 1938, respectively; Section 19.113 (a) (5)–1 (d) of Treasury Regulations 103, promulgated under the Internal Revenue Code.

In *Reynolds* v. *Commissioner,* 114 F. (2d) 804 (C. C. A. 4th), pending on petition for certiorari, No. 684, this Term, the court remarked that if Section 113 (a) (5) of the 1934 Act did not apply to a fiduciary's purchase, then no statutory provision was applicable. On the contrary, the applicable provision is the ordinary rule laid down in Section 113 (a) that "The basis for determining the gain or loss from the sale or other disposition of property shall be the cost of such property; * * *." Property purchased by a fiduciary comes within this provision. It does not require that the basis

shall be the cost to the particular taxpayer who sells the property. But even if it did, it would be fair to assume that the price paid by the fiduciary out of the estate held for the benefit of the taxpayer was cost to the taxpayer. Article 113 (a) (5)–1 (d) of Treasury Regulations 86, which reaches this result, is certainly valid (*Helvering* v. *Winmill,* 305 U. S. 79), and, we submit, represents the correct interpretation of earlier as well as later acts.[16]

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[16] In the *Reynolds* case the court interpreted Article 113 (a) (5)–1 (d) of Treasury Regulations 86 as applicable only to purchases by fiduciaries acting for decedents who died before March 1, 1913. Even a casual examination of this regulation shows that this construction does violence to both its form and purpose. It reads:

"ART. 113 (a) (5)–1. *Basis of property acquired by bequest, devise, or inheritance.*—* * *

* * * * * * * * *

"(d) *Property acquired before March 1, 1913; reinvestments by fiduciary.*—If the decedent died before March 1, 1913, the fair market value on that date is taken in lieu of the fair market value on the date of death, but only to the same extent and for the same purposes as the fair market value on March 1, 1913, is taken under section 113 (a) (14).

"If the property is an investment by the fiduciary under a will (as, for example, in the case of a sale by a fiduciary under a will of property transmitted from the decedent, and the reinvestment of the proceeds), the cost or other basis to the fiduciary is taken in lieu of the fair market value at the time when the decedent died."

The second paragraph of the regulation covers all purchases by testamentary fiduciaries without regard to the date of the decedent's death, and was not intended to be limited by the first. The Fourth Circuit's construction is also out of harmony with related Articles 113 (a) (2)–1 (d) and 113 (a) (3)–1 (c).

We therefore submit that the phrase "acquired by bequest, devise, or inheritance" employed in the acts other than those of 1928 and 1932 does not encompass purchases either by executors or testamentary trustees. While the words "acquired either by will or by intestacy" would not ordinarily bear a different construction, the legislative history of the 1928 Act requires, as we have already acknowledged, that the words just quoted be interpreted to cover purchases by executors. But in the interest of harmony with the other acts, as well as for the reasons already given, the words in question should not be extended to include purchases by trustees.

The decision of this Court in *Lyeth* v. *Hoey*, 305 U. S. 188, cited by the taxpayers (Br. 28–29) is not inconsistent with our position. There this Court held that a taxpayer who succeeded in obtaining a share of the decedent's estate by compromise of a suit to break the will acquired that share "by inheritance" within the meaning of the exempting provision. Since the taxpayer occupied the position of an heir in the sense that he would have received a share of the estate if the decedent had died intestate, the property he received was treated as though it had come to him by inheritance in the course of the regular administration of the estate without the compromise. The Court did not consider the question here presented.

The only cases in which the circuit courts of appeals have constructed Section 113 (a) (5) of the

1928 and 1932 Acts in its application to fiduciaries' purchases are the instant case, in which purchases by testamentary trustees were involved [17] and in which the Government's contentions were upheld by the Circuit Court of Appeals for the Seventh Circuit, and the decision to the contrary by the Circuit Court of Appeals for the Second Circuit in *Commissioner* v. *Gambrill,* 112 F. (2d) 530, and related cases, now pending before this Court on writ of certiorari, Nos. 472–475, this Term, in which subdivision (5) was held to be applicable both to property purchased by executors and to property purchased by testamentary trustees, and delivered in kind to the taxpayers.

CONCLUSION

We submit that the decision below is correct, both in holding that under Section 113 (a) (5) of the 1928 Act the basis for the decedent's property which came to petitioner through the testamentary trust is its value at the time of distribution by the decedent's estate to the trustees, rather than its value at the time of delivery by the trustees to petitioner, and in holding that subdivision (5) is inapplicable to the purchases by the testamentary trustees. If this Court agrees with us, the decision

[17] Petitioner's brief (p. 25) speaks as though there had been purchases by the executors in the instant case. No such purchases are revealed by the record. Cf. R. 16–17, 33–34, 38.

below should be affirmed. If it disagrees with us on both points the decision below should be reversed and that of the Board of Tax Appeals affirmed. In the event that it is held that the court below is wrong on either ground and right on the other, a remand to the Board will be necessary to permit the deficiency to be determined by agreement of the parties or otherwise.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
NORMAN D. KELLER,
THOMAS E. HARRIS,
ARTHUR A. ARMSTRONG,
Special Assistants to the Attorney General.

JANUARY 1941.

APPENDIX A

Revenue Act of 1928, c. 852, 45 Stat. 791, 818:

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(2) *Gift after December 31, 1920.*—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner;

(3) *Transfer in trust after December 31, 1920.*—If the property was acquired after December 31, 1920, by a transfer in trust

(other than by a transfer in trust by a bequest or devise) the basis shall be the same as it would be in the hands of the grantor, increased in the amount of gain or decreased in the amount of loss recognized to the grantor upon such transfer under the law applicable to the year in which the transfer was made;

(4) *Gift or transfer in trust before January 1, 1921.*—If the property was acquired by gift or transfer in trust on or before December 31, 1920, the basis shall be the fair market value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in section 402 (e) of the Revenue Act of 1921, or in section 302 (f) of the Revenue Act of 1924 or the Revenue Act of 1926 (relating to property passing under power of appointment) regardless of the time of acquisition;

(5) *Property transmitted at death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times

prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death;

* * * * *

(b) *Property acquired before March 1, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be:

(1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided), or

(2) the fair market value of such property as of March 1, 1913,

whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 591. *Basis for determining gain or loss from sale.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, is, in general, the cost of such property. This general rule is, however, subject to the exceptions set forth in section 113 and articles 592-604. The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, is (1) the cost

of such property (or, in the case of such property as is described in paragraphs (1), (4), and (5) of section 113 (a) and articles 592, 595, and 596, the basis therein provided); or (2) the fair market value of such property as of March 1, 1913; whichever is greater.

* * * * *

ART. 596. *Property transmitted at death.*— In the following cases the basis for determining gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the fair market value of the property at the time of the death of the decedent:

(1) Personal property acquired by specific bequest;

(2) Real property acquired by general or specific devise or by intestacy; and

(3) Property, whether real or personal, in the hands of a decedent's estate, acquired by the estate from the decedent (see article 863).

In all other cases where property was acquired either by will or by intestacy after February 28, 1913, the basis shall be the fair market value of the property at the time of its distribution to the taxpayer.

* * * * *

If the property was acquired prior to March 1, 1913, the gain or loss from the sale or other disposition thereof shall be computed upon the basis provided in section 113 (b) and article 591.

For the purposes of this article, the value of property as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax, its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed

to be its fair market value at the time of the death of the decedent.

APPENDIX B

S. Rep. No. 960, 70th Cong., 1st Sess., pp. 26–27:

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS—EXECUTORS' SALE.

The decision by the Court of Claims in *McKinney* v. *United States* has caused confusion in the existing law as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate. The House bill in section 113 (a) (5) provides that in such cases the basis shall be the fair market value of the property at the time of the death of the decedent. In the same section the House bill provides the same basis shall be used where the property is sold by the beneficiary.

It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's death cannot properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living.

Accordingly, the committee has revised section 113 (a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmis-

sion of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary.

Section 113 (a) (4) is amended so as to provide that the basis in the case of property passing under power of appointment, regardless of the time of acquisition, shall be the fair market value on the date of acquisition, which is the rule of the present law and of the House bill.

Section 113 (a) (3) is amended by striking out the last sentence of the House bill, with the effect of including within the paragraph all classes of transfers in trust made after December 31, 1920 (even if made in contemplation of death or to take effect in possession or enjoyment at or after death). The basis thus provided is the basis the property would have in the hands of the grantor, adjusted for gain or loss recognized to the grantor when the transfer was made.

The effect of striking out the last sentence of section 113 (a) (3) is also to make the basis in the case of gifts in contemplation of death or to take effect in possession or enjoyment at or after death, if made after December 31, 1920, the same as the basis which the property would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift.

H. Conference Rep. No. 1882, 70th Cong., 1st Sess., p. 14:

Section 113 (a) (5) is amended (No. 75) so as to provide that in the case of specific bequest of personalty or a general or specific devise of realty or the transmission of realty by intestacy the basis shall be the fair market value of the property at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest, or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary; * * *.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 346

JEREMIAH D. MAGUIRE AND RUTH S. MAGUIRE,
Petitioners,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING ON BEHALF OF PETITIONERS.

ALBERT H. VEEDER,
FRANCIS E. BALDWIN,
Counsel for Petitioners.

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PETITION FOR REHEARING ON BEHALF OF PETITIONERS.

The petitioners, Jeremiah D. Maguire and Ruth S. Maguire, respectfully petition this Honorable Court for rehearing and reconsideration of the decision in this cause announced on March 31, 1941, and, as reason therefor, respectfully submit the following:

1. This Court erred in holding that the basis of the taxpayer, Ruth S. Maguire,[1] as to the personalty owned by the decedent, Gustavus F. Swift, at his death and delivered to the taxpayer on March 29, 1923, was its fair

1. Petitioners are husband and wife who filed a joint return. The income here involved is that of the wife.

market value on December 11, 1905, when it was received by the trustees from the executors.

2. This Court erred in holding that taxpayer's basis of the personalty purchased by the testamentary trustees and delivered to the taxpayer on March 29, 1923, was its cost to the trustees.

The applicable statute expressly provided that the basis of a distributee of personal property acquired by general bequest should be its fair market value at the time of the distribution to the taxpayer; but the statute contains no provision that such beneficiary's basis should in any manner or to any extent be fixed with regard to the manner in which testamentary trustees had obtained the property, or the price which the trustees may have paid for it, or the basis which such trustees would have been required to use if they had sold it. Nor is there any express statutory authority for determining such a beneficiary's basis by substituting the basis of testamentary trustees, or of any other prior owner.

There is nothing in any Congressional report which shows that Congress, in enacting Section 113 (a) (5) of the Revenue Act of 1928, gave any consideration to the taxation or escape from taxation of increment in value of property in the hands of testamentary trustees. The purpose of Congress was to clarify the statute; this it accomplished by the use of ordinary words with ordinarily accepted meanings.

The motive which governed Congress in changing the law in 1928 appears clearly from the Congressional reports cited in the briefs and in the decision of this Court. That motive was to eliminate the confusion and doubt arising from the interpretation by the courts of the term "time of acquisition". Congress changed the law by discarding the clause "time of acquisition" and adopting in its stead the term "time of death of the decedent" in respect of real

estate and personal property specifically bequeathed and "time of the distribution to the taxpayer" in respect of all other property acquired by will or by intestacy.

It is respectfully submitted that the use by Congress of the phrase "at the time of the distribution to the taxpayer" was deliberate and studied; that the meaning of the words used in the applicable statute requires no construction. The words of the statute "the time of the distribution to the taxpayer" must have meant the time of the delivery to the taxpayer. There is nothing in the statute, express or implied, which reveals or indicates that the language of the statute was intended to apply only to a distribution at the time of the closing of an estate. The third sentence of § 113 (a) (5) of the Revenue Act of 1928, which provides:

> "In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer",

applies alike to and fixes the basis of all personal property acquired by intestacy or by general bequest. The express language of said sentence is broad and clear and applies to personal property purchased by testamentary trustees, as well as by executors. This being true, taxpayer's basis of all the property involved in this case was its fair market value at the time of the delivery by the testamentary trustees.

There is no difference in principle between the acquisition by a residuary legatee of personal property purchased by an executor and personal property purchased by a testamentary trustee. In either case the beneficiary who received such property acquired it under and by virtue of the testator's will. This is true because an executor and a

testamentary trustee are creatures of the testator who made the will, and, therefore, whether such personal property so acquired by a beneficiary under a will was purchased by the executor or by testamentary trustees is immaterial. It is immaterial because such personal property was acquired by the beneficiary by will.

Ruth S. Maquire did not acquire by purchase any of the property involved herein. It cost her nothing. She acquired all of such property under, by virtue of, and pursuant to, the terms of the will of her father. As to this, the Court said:

> "The taxpayer's share of a testamentary trust, established pursuant to the will of her father, was delivered to her in kind in 1923.
>
> * * *
>
> "* * * To be sure, the taxpayer's right in the property in question had its source in the provisions of the will. But there is no indication that Congress in drafting § 113 (a) (5) looked beyond the distribution of the estate by the executors. In that connection, the Senate Report specifically stated that the foregoing provision of § 113 (a) (5) governed purchases by the executors. No reference was made to purchases by testamentary trustees. The inference is strong that Congress was fashioning § 113 (a) (5) on the theory that for income tax purposes acquisition of personal property passing by general bequest or intestacy did not occur until distribution of the estate was made. In that posture of the problem, property purchased by the executor (acting, so to speak, in the decedent's stead) prior to that distribution was acquired by the distributee 'by will'. But once the administration of the estate had been completed and the basic testamentary disposition effected, subsequent purchases were to be governed by cost as provided in § 113 (a)."

The Court then concluded that subsequent purchases by testamentary trustees

> "would not be part of the original inheritance. Certainly if the trustees themselves had sold the property,

the transaction would have been taxable on the cost basis. To hold that a different basis applies in case the beneficiary made the sale would be to open an avenue for tax avoidance."

True it is that if the trustees, themselves, had sold the property, the transaction would have been taxable on the cost basis, because the trustees acquired the property by purchase; but the beneficiaries did not acquire by purchase any of the property which was distributed to them.

It is respectfully submitted that the plain language of the applicable statute requires that this Court decide that the basis of the personal property originally owned by the decedent and distributed to the taxpayer, Ruth S. Maguire, and of the personal property purchased by the testamentary trustees and distributed to the taxpayer, was the fair market value of all of such property on March 29, 1923, which was the time of the distribution to the taxpayer.

Respectfully submitted,

ALBERT H. VEEDER,
FRANCIS E. BALDWIN,
Counsel for Petitioners.

Dated, Chicago, Illinois,
April 25, 1941.

Certificate of Counsel.

I, Francis E. Baldwin, one of the counsel for Petitioners herein, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

Francis E. Baldwin

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SUPREME COURT OF THE UNITED STATES.

No. 346.—October Term, 1940.

Jeremiah D. Maguire and Ruth S. Maguire, Petitioners, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[March 31, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

The taxpayer's[1] share of a testamentary trust, established pursuant to the will of her father, was delivered to her in kind in 1923. The property was personalty, part of which had been owned by the decedent and part purchased by the trustees. The decedent died in 1903 and his executors were discharged by the probate court in 1905. Pursuant to that order the executors turned over to themselves, as trustees, all of the residue of the estate.[2] From that residue the taxpayer's claim to the property in question derived. During the year 1930 parts of both groups of property were sold.[3] The questions presented relate to the proper basis under the Revenue Act of 1928 (45 Stat. 791) for determining gain or loss upon those sales: (1) whether the basis in case of the personalty owned by decedent is its value when received by the trustees from the executors or its value at the date of delivery by the trustees to the taxpayer; and (2) whether the basis in case of the personalty purchased by the trustees is its cost to the trustees or its value at the

[1] Petitioners are husband and wife who filed a joint return. The income here involved is that of the wife.

[2] The will directed the executors and trustees, not less than ten and not more than twenty years after the death of the testator, to make final distribution of this residue as follows: ". . . to my wife the one-third part thereof, the balance to be equally divided among my children, share and share alike, and should my wife not be living at the time of such distribution, then the same shall be divided equally among my children, share and share alike, the descendants of any deceased children in such distribution to take the proportion of their deceased parent, . . ."

[3] The sales were made by trustees of new *inter vivos* trusts under which the property had been placed on its delivery in 1923. It was stipulated that the beneficiaries (including the taxpayer) were taxable as though the sales were made by them individually.

date of delivery by the trustees to the taxpayer. The case is here on a petition for certiorari which we granted because of a conflict among the circuits on those two questions.[4]

I. As respects the property owned by the decedent at his death, we are of the view that the date when it was received by the trustees from the executors, rather than the date when it was delivered by the trustees to the taxpayer, governs. In the case of general bequests, § 113(a)(5) of the Revenue Act of 1928 provided that "the basis shall be the fair market value of the property at the time of the distribution to the taxpayer."[5] But in case of specific bequests of personalty or in case of realty, the basis was the fair market value of the property at the death of the decedent. Sec. 113(a)(5). In the latter cases the property either vested in the heir or devisee at death or was rather definitely marked at the time of death for the legatee. In the former the legatee normally must have awaited administration of the estate before the property bequeathed to him could have been identified with certainty. That difference sug-

[4] The opinion of the court below is reported at 111 F. (2d) 843. On the first question it held that the basis was the value at the time the property was received by the trustees from the executors; on the second, that the basis was cost to the trustees. On those two questions that decision is in conflict with Commissioner *v.* Gambrill, 112 F. (2d) 530, from the Second Circuit Court of Appeals. And see Commissioner *v.* Libbey, 100 F. (2d) 458.

[5] Sec. 113(a)(5) provided: "(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that . . . (5) Property transmitted at death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death;"

Sec. 113(b) provided: "(b) Property acquired before March 1, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be: (1) the cost of such property (or, in the case of such property as is described in subsection (a) . . . (5) . . . of this section, the basis as therein provided), or (2) the fair market value of such property as of March 1, 1913, whichever is greater."

gests the distinction in treatment under § 113(a)(5) of general bequests of personalty. It emphasizes that the words "at the time of the distribution to the taxpayer" meant the time when the distribution was made out of the estate. It supports the view that Congress focused § 113(a)(5) on the decedent's death and the administration of his estate, and not on subsequent transfers or transmissions of the property.

The legislative history of § 113(a)(5) lends support to that conclusion. Prior to the 1928 Act the basis for property obtained by bequest, devise, or inheritance was the fair market value "at the time of such acquisition".[6] The House Bill[7] which became the Revenue Act of 1928 provided that the basis for all property acquired by bequest, devise, or inheritance should be the fair market value of the property at the date of the decedent's death—a provision designed to clarify[8] the meaning of "acquisition" in the earlier acts.[9] In the Senate that language of § 113(a)(5) was changed to the form in which it appeared in the Revenue Act of 1928—a change specifically designed to avoid the confusion as to

[6] Revenue Act of 1921 (42 Stat. 227) § 202(a); Revenue Act of 1924 (43 Stat. 253) § 204(a); Revenue Act of 1926 (44 Stat. 9) § 204(a).

[7] H. R. 1, 70th Cong., 1st Sess.

[8] H. Rep. No. 2, 70th Cong., 1st Sess., Int. Rev. Bull., Cum. Bull. 1939-1, Pt. 2, p. 396. And see Report of the Joint Committee on Internal Revenue Taxation, H. Doc. No. 139, 70th Cong., 1st Sess., pp. 17-18.

[9] Much of that confusion was later eliminated by Brewster *v.* Gage, 280 U. S. 327, holding that in case of a residuary legatee of personal property the time of "acquisition" was the date of decedent's death, not the date of distribution of the property by the executors to the legatee. That decision was rendered in 1930 under the 1918 and 1921 Acts. The wording of § 113(a)(5) contained in the 1928 Act was continued in the 1932 Act (47 Stat. 169, 199). But under the 1934 Act (48 Stat. 680, 706) there was a return to the language of the 1926 Act, the Senate Report stating: "Section 113(a)5 of the Revenue Act of 1932 is a reenactment of a similar provision contained in the 1928 Act. The change in the 1928 Act was made because there was some doubt as to the meaning of the term 'date of acquisition,' which was the term used under the Revenue Act of 1926. Since the 1928 Act was passed, the Supreme Court has defined 'the date of acquisition' to mean the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal. (Brewster *v.* Gage, 280 U. S. 327.) Section 113(a)5 of the House bill conforms to the language contained in the Revenue Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal." S. Rep. No. 558, 73d Cong., 2d Sess., Int. Rev. Bull., *supra* note 8, pp. 612-613.

the basis on which gain or loss on the sale of property purchased by the executor and distributed to beneficiaries was to be determined.[10]

There does not appear to be the slightest suggestion that this change was designed as a substantial departure from the value-at-death rule. To be sure, it did produce a limited deviation from that principle in that no income tax effect was to be given changes in value of personal property, passing otherwise than by specific bequest, during the administration of the estate. But to hold that it effected the change which petitioner urges would be to impute to Congress a purpose to go far beyond the exigencies of the specific situations with which it was dealing.

The language used does not require that result. "Distribution to the taxpayer" is not necessarily restricted to situations where property is delivered to the taxpayer. It also aptly describes the case where property is delivered by the executors to trustees in trust for the taxpayer. Such distribution of the estate results in the acquisition by the taxpayer of an equitable estate under the testamentary trust. The fact that he does not then obtain possession or control, the fact that his interest is conditional or contingent, the fact that legal title may not be transferred to him until years later, are immaterial. Sec. 113(a)(5) merely provided a point of refer-

[10] S. Rep. No. 960, 70th Cong., 1st Sess., Int. Rev. Bull., *supra* note 8, p. 409, where it was said (p. 427): "It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's death can not properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living.

"Accordingly, the committee has revised section 113(a)5 and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary."

ence and a standard of value for determination of gains or losses realized on subsequent sales of property acquired by bequest, devise, or inheritance. In *Brewster* v. *Gage*, 280 U. S. 327, 334, this Court held under earlier acts[11] that the date of death was the date of "acquisition" even in case of a residuary legatee whose interest at the date of death clearly was not absolute. That conclusion suggests that the critical date is the time when the legatee acquires some interest in the property although his interest then may not be unconditional. Hence, in case of remainders governed by § 113(a)(5) of the 1928 Act, it cannot realistically be asserted that the date when the remainderman acquired his interest came later than the time when he obtained an equitable estate under the testamentary trust.

There are other reasons why we cannot infer that Congress intended to make more than a limited departure from the value-at-death principle in enacting § 113(a)(5) of the 1928 Act. As respondent points out, there would be a substantial disparity between the treatment of remaindermen of realty and remaindermen of personalty under the same testamentary trust, if the latter were given a basis of value at the time of distribution by the trust. Furthermore, we cannot on the basis of the legislative history of § 113(a)(5) impute to Congress a purpose to allow trustees either to sell the property or to distribute it in kind, as would be most advantageous for tax purposes. The creation of such an opportunity for manipulation of tax liability cannot be lightly presumed. Similarly we cannot assume in absence of explicit provisions that Congress intended to create substantial periods of time following the date of death during which the value of the property bequeathed would have no incidence as respects subsequent gains or losses. Respect for the obvious symmetry of this statutory scheme induces the conclusion that there was a "distribution to the taxpayer" when this property was delivered by the executors to the trustees.[12]

II. As respects the property which was purchased by the trustees, we are of the view that its cost to them, rather than its value at the

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[11] See note 9, *supra*.

[12] We are not aided by administrative construction. The Bureau of Internal Revenue originally took the view which we have reached. G. C. M. 6195, VIII—1 Cum. Bull. 99 (1929). This view was reversed in G. C. M. 11309, XII—1 Cum. Bull. 126 (1933). Its original view was again taken in G. C. M. 14893, XIV—1 Cum. Bull. 202 (1935).

date of delivery to the taxpayer, governs. Sec. 113(a) provided that the basis in case of property acquired after February 28, 1913, should be "the cost of such property".[13] That standard controls here unless these transactions are governed by the provision of § 113(a)(5) that, "In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer." The latter provision is applicable if the property in question was "acquired . . . by will". We think it was not.

The title of § 113(a)(5) is "Property transmitted at death." While the title of an act will not limit the plain meaning of the text (*Caminetti* v. *United States,* 242 U. S. 470, 490; *Strathearn S.S. Co.* v. *Dillon,* 252 U. S. 348, 354), it may be of aid in resolving an ambiguity. *Knowlton* v. *Moore,* 178 U. S. 41, 65. It suggests, as does the legislative history which we have related, that the foregoing provision of § 113(a)(5) was confined, with minor exceptions, to the specific property owned by the decedent at his death. To be sure, the taxpayer's right in the property in question had its source in the provisions of the will. But there is no indication that Congress in drafting § 113(a)(5) looked beyond the distribution of the estate by the executors. In that connection, the Senate Report specifically stated that the foregoing provision of § 113(a)(5) governed purchases by the executors.[14] No reference was made to purchases by testamentary trustees. The inference is strong that Congress was fashioning § 113(a)(5) on the theory that for income tax purposes acquisition of personal property passing by general bequest or intestacy did not occur until distribution of the estate was made. In that posture of the problem, property purchased by the executor (acting, so to speak, in the decedent's stead) prior to that distribution was acquired by the distributee "by will". But once the administration of the estate had been completed and the basic testamentary disposition effected, subsequent purchases were to be governed by cost as provided in § 113(a). Property so purchased would not be part of the original inheritance. Certainly if the trustees themselves had sold the property, the transaction would have been taxable on the cost basis. To hold that

[13] See note 5, *supra.* And see § 113(b), *supra* note 5, as respects the basis in case of property acquired before March 1, 1913.

[14] S. Rep. No. 960, *supra* note 10.

a different basis applies in case the beneficiary made the sale would be to open an avenue for tax avoidance. Furthermore, we are dealing here with a statutory scheme which in general recognizes value at the date of death in computing subsequent gains or losses. We are not inclined in absence of clear and unambiguous language to imply a greater deviation from that principle than that which is necessitated by the declared objective of Congress.

Affirmed.

The CHIEF Justice and Mr. Justice ROBERTS are of opinion that the judgment should be reversed for the reasons stated in the opinion of the Circuit Court of Appeals for the Second Circuit in *Commissioner* v. *Gambrill*, 112 F. (2d) 530.

A true copy.

Test: /

Clerk, Supreme Court, U. S.

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